

# Supreme Court of the United States

OCTOBER TERM, 1949.

No.

BERNICE B. FERES, as Executrix under  
the Last Will and Testament of Ru-  
dolph J. Feres, Deceased,

Petitioner,

against

THE UNITED STATES OF AMERICA.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Preliminary Statement.

The statement of matters involved, jurisdiction and questions presented appears in the petition for a writ of certiorari herein and in the interest of brevity are incorporated herein by reference.

### Opinions Below.

The opinion of the Court of Appeals is attached to a transcript of the record (R. 13). It was rendered on the 4th of November, 1949, 177 Fed. 2d 535. The opinion of the District Court appears fully in the record which has been filed with this Court (R. 3).

### Summary of Argument.

1. There is nothing in the wording of the Tort Claims Act, its purpose or legislative history to permit the Courts below to read into an Act a further exception that dependents of a deceased soldier are not entitled to recovery under the Act. The purpose of the Act was to relieve Congress from the consideration each year of the multitude of private bills for relief of dependents of military personnel and to have all claims decided by the Federal Court except those specifically excluded.

2. The authorities relied upon by the Court below are distinguishable and do not represent the law. These cases dealt with construction of a statute of limited application and not a statute of general application or a general waiver of immunity such as the Tort Claims Act.

3. Since this Court has held in the *Brooks* case that a soldier on furlough may sue under the Act, the decedent sleeping in a barracks in this country may be said to be under an equivalent status as a soldier on furlough.

If we assume that a soldier should not sue while a member of the Armed Services that disability does not apply to his dependents.

Furthermore, since the Tort Claims Act creates a right which becomes vested, this right cannot be considered supplanted by the privileges that a soldier or his dependents may obtain under pension systems which are gratuities.

The construction of the Act by the several Courts below has thrown the application of the Act into confusion and has created subtle distinctions and exceptions which Congress did not place in the Act and which would require further congressional action to place there.



The proximate cause of the decedent's death was the negligence of some third party, an employee of the Government, and not the performance of any duty as a soldier, or directly pertaining to his particular status at the time of the fatal injury.

## POINT I.

There is nothing in the wording of the Act, its legislative history or purpose that permitted the Court below to read into the Act an exception that the legal representatives of a deceased soldier were not entitled to sue for the death of the soldier arising out of injuries received while assigned to and sleeping in a barracks in this country.

This Court in *Brooks v. United States*, 337 U. S. 49 (May 16, 1949), unequivocally stated (p. 51):

"The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. Sec. 421. None exclude petitioners' claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim.' It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions makes this plain."

Since the statutory language is clear and not ambiguous, the Court should leave it as it finds it and not undertake to modify or qualify its natural effect and meaning.

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."

*Caminetti v. United States*, 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442, 452.

*Mackenzie v. Hare*, 239 U. S. 299, 309, 36 S. Ct. 106, 60 L. Ed. 297, 300.

*Adams Express Company v. Kentucky*, 238 U. S. 190, 199, 35 S. Ct. 824, 59 L. Ed. 1267, 1270.

"(This) is not to construe the statute but to add an additional and qualifying term to its provisions. This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction."

*Osaka Shosen Kaisha Line v. United States*, 300 U. S. 98, 101; 57 S. Ct. 356; 81 L. Ed. 532, 534.

The proper viewpoint is well expressed, with citations of numerous authorities, in 50 Am. Jr., pp. 204-207, as follows:

"A statute is not open to construction as a matter of course \* \* \*. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning \* \* \* the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the

language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

In *Equitable Life Assurance Society v. Pettus*, 140 U. S. 226, 233; 35 L. Ed. 497, 500; 11 S. Ct. 822, 825, the Court said:

"This construction is put beyond doubt by section 5986 which, by specifying four cases—in which the three preceding sections 'shall not be applicable' necessarily implies that those sections shall control all cases not so specified."

The specific exclusions, therefore, carry the implication that all claims not thus excluded may be successfully asserted.

Another statement of such rule arose in an action where the defense attempted to limit the right to recover against the sovereign for undisputed claims. Mr. Justice Cardozo, while sitting on the Court of Appeals of New York, said in *Anderson v. Hayes Construction Co.*, 243 N. Y. 140, 147; 153 N. E. 28, 29:

"The exemption of the sovereign from suit involves hardship enough when consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

While a statute in derogation of sovereignty must be strictly construed (*United States v. Sherwood*, 312 U. S. 584, 61 Sup. Ct. 767, 85 L. Ed. 1058, 1941), the interpretation must not be so narrow as to defeat the statute's purpose (see *Canadian Aviator, Lim., v. United States*,

324 U. S. 215, 222, 65 Sup. Ct. 639, 643, 89 L. Ed. 901, 907, 1945; 3 Sutherland, Statutory Construction, sec. 6302, 3d Ed. Horack, 1943).

Mr. Justice Holmes in *United States v. Pulaski Co.*, 243 U. S. 105, stated (p. 106):

“There is a strong presumption on that the literal meaning is the true one, especially as against a construction that is not interpretation, but perversion; that takes from the proviso its ostensible purpose to impose a condition precedent. \* \* \*”

The Act is a general waiver of immunity intended to do away with the old practice of waiving sovereign immunity by special act.

No more involved refinement of construction can be imagined than that now urged by the Government in its efforts to avoid the inevitable results implicit in the *Brooks* decision.

The Government in effect says that Congress, having made detailed exclusions from the coverage of the Act, nevertheless really intended another important exclusion, but forgot or overlooked to write it in and that, therefore, the Court should do so by judicial fiat; that Congress, although it considered excluding all members of the Armed Forces from the coverage of the Act, nevertheless rejected such exclusion, but intended to exclude some, but forgot or overlooked doing so, and that, therefore, the Court must do so by judicial fiat; that Congress, while still considering the bill and envisaging certain dire consequences if all torts arising from combatant activities during time of war were included, therefore excluded such torts, but intended to exclude more, or rather intended to exclude a certain class of claimants, whether or not engaged in such combatant activities, but that Congress likewise forgot or overlooked doing this also, and that, therefore, the Court must do so by judicial fiat.

*The legislative history precludes the construction put upon the Act by the Court below.*

Utterly conclusive of the case would seem to be the fact that Congress specifically considered and deliberately rejected an exception having exactly the same effect as that which the Court below now writes into the Act. This is to be seen undeniably in the following circumstances:

The original predecessor of the Federal Tort Claims Act was a bill, H. R. 7236, introduced in the 76th Congress. It, like the present Law, provided for general waiver of the Government's immunity to tort suits and in it there were listed substantially the same twelve exceptions and exclusions which appear in the present Act. But in addition to these, there was at that time another exception proposed which would have excluded from the cover of the Act:

“Any claim for which compensation is provided by the \* \* \* World War Veterans' Act of 1924, as amended.”

The theory of this exception, just as the Government now urges in support of the lower Court's decision in the present case, was that the World War Veterans' Act of 1924, as amended, confers certain governmental benefits, such as the right to compensation payments, upon all persons injured while in the armed services of the United States, and therefore such persons should not also have the benefit of a general statute permitting tort suits against the Government. The clear purpose and effect of the proposed exception was thus to exclude all members of the armed services from rights of action under the contemplated Statute. Conversely it seems to have been considered obvious (see Congressional Record, Vol. 86, Pt. II, 76th Congress, 3d Sess., 1940, pp. 12015-12032 and see also footnote, p. 212, *Jefferson v. United States*, 74 F. Supp. 209) that under the proposed Statute's general opening of



the way to tort suits against the Government, members of the armed services would be able to sue like all other persons unless some such exception was expressly written into the Statute. Though debated, the bill was of course not enacted by the 76th Congress.

In the 79th Congress, the same bill, retitled H. R. 181, was again introduced with all its exceptions including the additional or thirteenth exception quoted and discussed above. Congress again considered the Bill, *struck out of it the exception in question*, and enacted the remainder as the present Federal Tort Claims Act. Yet the Court below now sees fit to put back into the Statute the exact exception that Congress deliberately struck out of it! In this it is respectfully submitted, the Court exceeded its province.

The Federal Tort Claims Act, as its history partially outlined above indicates, was no hasty or ill-considered piece of legislation. And the Court below does wrong to treat it as if it were. The Court does wrong to assume that Congress was not aware of or did not comprehend what it was doing, even though it used words "crystal clear," when it enacted a Statute broad enough to include within its scope members of the armed services along with all other persons generally. The Court does wrong to assume that when Congress gave its attention to the subject of exceptions or exclusions from the Act and carefully etched out twelve such exceptions, it overlooked and failed to mention a thirteenth exception which it really intended. Certainly and above all the Court does wrong when it disregards the fact that Congress did consider such thirteenth exception. And for the Court to write the effect of that exception back into the Statute after Congress deliberately and specifically struck it out, is unjustifiable.



In the Report of the Joint Committee pursuant to H. Cong. Res. 18, 79th Congress, 2d Session, House Report No. 1675, it is stated at page 25:

"2. Delegation of Private Claims

Recommendation: That Congress delegate authority to the Federal courts and to the Court of Claims to hear and settle claims against the Federal Government; and that Government agencies and departments be empowered to handle local and private matters now provided for in private bills, such as private pension bills and legislation authorizing construction of bridges over navigable streams.

Congress is poorly equipped to serve as a judicial tribunal for the settlement of private claims against the Government of the United States. This method of handling individual claims does not work well either for the Government or for the individual claimant, while the cost of legislating the settlement in many cases far exceeds the total amounts involved.

Long delays in consideration of claims against the Government, time consumed by the Claims Committee of the House and Senate, and crowded private calendars combine to make this an inefficient method of procedure.

The United States courts are well able and equipped to hear these claims and to decide them with justice and equity both to the Government and to the claimants. We therefore recommend that *all claims for damages* against the Government be transferred by law to the United States Court of Claims and to the United States district courts for proper adjudication.

We further recommend that private pension bills and other bills dealing with purely local and private matters, including the authority to construct bridges over navigable streams, be delegated to the proper agencies of government for final determination." (Italics ours.)

In the Senate Report No. 1400 to accompany S. 2177, at pages 18 and 19, it is stated:

**"Part 2. Provisions Applicable to Both Houses  
Section 121. Private bills banned**

This section bans private bills, resolutions, and amendments authorizing or directing the payment of property damages or personal injuries *or death or for pensions*; the construction of bridges across navigable streams; or the correction of military or naval records. It is provided, however, that the provisions of this section shall not apply to private bills or resolutions conferring jurisdiction on the Federal courts to hear, determine, and render judgment in connection with private claims otherwise cognizable under the Federal Tort Claims Act if the claim accrued between January 1, 1939, and December 31, 1944, the last day being the day before the effective date (for the purpose of accrual of claims) of the Federal Tort Claims Act. This will permit consideration of bills or resolutions covering claims going back for a period of 6 years and would seem to be ample to prevent any inequities."  
(Italics ours.)

(p. 29):

**"Title IV-Federal Tort Claims Act**

This title waives, with certain limitations, governmental immunity to suit in tort and permits suits on tort claims to be brought against the United States. It is complementary to the provision in title I banning private bills and resolutions in Congress, leaving claimants to their remedy under this title."

Therefore it seems evident to us that Congress wanted to rid itself of the consideration of the great number of private bills for relief of military personnel and their families presented at every session.

Several cases arising under the Act have been interpreted as its primary purpose or intention to relieve Congress of the burden of dealing by private acts Tort Claims

and construction put upon the Act by the Court below and the Government defeats that purpose.

*United States v. South Carolina State Highway*,  
171 Fed. 2d 893.

*State Farm Mutual Liability Insurance Co. v. United States*, 172 Fed. 2d 737.

The position now assumed by the Government in litigation under the Act is at variance with the original purpose of the Act as so indicated by Congress.

For the first time in the history of this country has there been peace-time conscription and the present activities of the Federal Government reach corners never dreamt of by the founding fathers. It should not seem unusual that co-related with this extension of Government activity that there should be assumed Government liability and waiver of immunity from suit.

## POINT II.

**The decisions relied upon by the Court below are inapplicable.**

The Circuit Court below in affirming specifically relied upon *Dobson v. United States*, 27 Fed. 2d 807, cert. d. 278 U. S. 653, and *Bradey v. United States*, 151 Fed. 2d 742, cert. d. 326 U. S. 795, as well as *Jefferson v. United States*, 77 Fed. Supp. 706.

This Court in alluding to the *Dobson* and *Bradey* cases stated in *Brooks v. United States* (p. 62) (96 L. Ed. p. 886):

“But we are dealing with an accident which had nothing to do with the Brooks’ army careers, injuries not caused by their service except in the sense that all human events depend upon what has already

transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do *Dobson v. United States*, 27 F. 2d 807, *Bradey v. United States*, 151 F. 2d 742, and *Jefferson v. United States*, 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U. S. C. Sec. 223b. Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U. S. 198."

The decisions in the *Dobson* and *Bradey* cases are founded upon acts whose legislative history and purpose are no parallel to the Federal Tort Claims Act. The danger in drawing general conclusions from decisions under other statutes is admirably set forth by Mr. Justice Frankfurter in *Federal Trade Commission v. Bunte*, 312 U. S. 349, 353:

"Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

The Court below in relying upon those two cases may have overlooked that the Tort Claims Act, Section 421 (d) provides:

"(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C. title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U.S.C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States."

Thus, we must assume that Congress was aware of the decisions in the *Dobson* and *Bradey* cases because they expressly excluded all claims arising under the acts in those cases from the Tort Claims Act. We cannot assume that in making this exclusion they didn't know how the courts construed those acts.

It is, therefore, logical to assume when Congress came to write all the other exceptions they intended to include members of the Armed Forces except in those instances specifically excluded (i. e.) Subdivisions (j) and (k) and possibly (a) of Section 421.

Not only is there a serious difference of wording in the acts interpreted in the *Dobson* and *Bradey* cases but it must be important to bear in mind that the Federal Tort Claims Act represented a marked departure by the United States with respect to the waiving of sovereign immunity. It is the adoption of the trend of the last twenty-five years or more. The Federal Tort Claims Act is a comprehensive Act or general waiver of immunity. The acts interpreted in the *Dobson* and *Bradey* cases were special acts waiving immunity under certain conditions and to a limited extent.

The same view of the scope of the Act has been taken by the Circuit Court of Appeals for the Ninth Circuit in an opinion filed on April 8, 1948, in *Employees' Fire Insurance Co., et al., v. U. S.*, Civil Action No. 11743, 167 F. 2d 655. In reversing a District Court decision that an insurance company had no right of subrogation under the Act, the Circuit Court of Appeals said:

"The words of the Act indicate a clear and sweeping waiver of immunity. \* \* \* The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions."



## POINT III.

The Tort Claims Act does not differentiate between injuries received by a member of the Armed Services while on furlough or in any other status and while on active duty.

The Court below assumed from the face of the pleadings that a soldier sleeping in a barracks away from the combatant areas and after hostilities ceased was under a status different than a soldier on furlough. The Court below also inferred that the proximate cause of the soldier's death in the case at bar was the performance of some act of duty.

We respectfully submit it cannot be assumed from the pleadings or from the facts alleged that his death was caused by an act "incident to . . . service."

In the *Brooks* case this Court did not define the phrase "incident to . . . service." It has, however, been defined by the Judge Advocate General's Department to mean ". . . while engaged in the actual performance of some official duty." See Judge Advocate General's School, Claims By and against The Government, 39 (text no. 8, 1944).

Furthermore, there is a distinction between the case at bar and the *Jefferson* case, *supra*. In the *Jefferson* case it was the soldier himself suing while in the case at bar it is the widow of the soldier.

It may be that a soldier should be prohibited from suing while in the service as a matter of discipline. However, that disability, if it does exist, should not destroy any right he obtains by virtue of the Statute.



Very often penal statutes disable a convict from suing while under the disability of a sentence. The courts are almost universal in holding that such disability does not carry over to the convict's family or assignee and that the disability is personal to the convict and is removed when he is no longer under the consequences of his criminal sentence.

See:

*Green v. State of New York*, 278 N. Y. 15.

*Bamman v. Erickson*, 259 A. D. 1040, 21 N. Y. S. 2d 40.

Concededly, the plaintiff was and is not a member of the armed forces and whatever special status or disability her deceased husband had, no statute or rule of law grafts that same disability upon her.

The chief contention of the Government is that Congress must have intended to exclude members of the Armed Services (and their wives and dependents) because of the growth over the years of a system of pensions and benefits. This argument does not square up fully upon analysis. A reading of the several statutes mentioned does not seem to indicate that the allowances granted thereby are "rights," or that they will be allowed in all cases especially where the claim is that there is recurrence of a condition or injury received in time of war, 38 U. S. C., Sections 501 (a) and 501 (a-1).

Certain principles govern the determination whether the additional disability results from an injury or aggravation of an existing injury and the claimant must establish causation, 38 C. F. R. Cum. Supp., Section 2.1123 (b).

Although the Government may have been liberal in one sense, in a system of benefits and pensions, the system is not so all-inclusive and complete as to lend support to the contention that it is a complete substitute for a claim under the Federal Tort Act.

which they knew or should have known to be unsafe due to a defective heating plant and further negligence on the part of the fire guard assigned to the area in which the fire occurred and of the supervisors of the latter. Judge Brennan dismissed the complaint on the authority of *United States v. Brooks*, 169 F. 2d 840. That decision was by a divided court in the Fourth Circuit. The majority in an opinion by Judge Dobie, in which Judge Watkins concurred, held that there could be no recovery on behalf of two soldiers who while on furlough and taking a pleasure [fol. 15] drive suffered death and personal injury respectively through collision with an army truck. Judge Parker dissented on the ground that the language of the statute allowed suits by soldiers. The majority relied on the analogy to the decisions in this court refusing to allow naval personnel to recover damages under the Public Vessels Act. *Dobson v. United States*, 27 F. 2d 807, cert. den. 278 U. S. 653; *Bradley v. United States*, 151 F. 2d 742, 743, cert. den. 326 U. S. 795, rehearing den. 328 U. S. 880.

The Supreme Court reversed the Court of Appeals for the Fourth Circuit in an opinion by Justice Murphy [*Brooks v. United States*, 337 U. S. 49], from which Justices Frankfurter and Douglas dissented. The majority allowed recovery on the ground that the "accident to the soldiers had nothing to do with the Brooks' army careers," and added (at page 52), "were the accident due to the Brooks' service a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do *Dobson v. United States*, 27 F. 2d 807, *Bradley v. United States*, 151 F. 2d 742, and *Jefferson v. United States*, 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U. S. C. § 223 b."

The Tort Claims Act provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U. S. C. 2674. There are twelve exceptions to the Act,<sup>1</sup>

<sup>1</sup> 28 U. S. C. : *Exceptions*.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not

[fol. 16] but they relate to the cause of injury rather than to the character of a claimant who may seek to recover damages for his injuries. While they relieve the government in certain situations from liability to all persons including civilians, they do not mention soldiers specifically. There would seem to have been no reason for mentioning soldiers when the latter had not been treated as having claims for injuries incident to their service. See 31 U. S. C. § 223 b. [fol. 17] In the circumstances we see no reason for not adhering to the view we took as to damage claims of military personnel in *Dobson v. United States*, *supra* and *Bradey v. United States*, *supra*, and that which Judge Chesnut took in *Jefferson v. United States*, 77 F. Supp. 706, now on appeal in the Fourth Circuit. If more than the pension system had been contemplated to recompense soldiers engaged in military service we think that Congress would not have left such relief to be implied from the general terms of the Tort Claims Act, but would have specifically provided for it. The only exception to this interpretation of the statute which

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such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing

seems to have been recognized by the Supreme Court in the *Brooks* case applied to situations where military personnel were not on active duty.

It might be thought that our conclusion is somewhat weakened by the fact that when the Tort Claims Act was introduced in Congress, H. R. 181, 79th Cong., 1st Sess., it contained a thirteenth exception, making the Act inapplicable to "Any claim for which compensation is provided by the Federal Employees Compensation Act, as amended, or by the World War Veterans Act of 1924, as amended." This exception was omitted in the Act as finally passed. However, the Federal Employees Compensation Act, as amended, provided that as long as an employee is in receipt of compensation under that Act "he shall not receive from the United States any salary, pay or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States \* \* \* " 5 U. S. C. A. § 759. And the World War Veterans Act of 1924, as amended, provided that "no other pension laws or laws providing for gratuities or payments in the event of death in the service" shall be applicable to disabilities or deaths made compensable under the Act. Consequently, it would seem that the explanation for the [fol. 18] omission of the thirteenth exception to the Tort Claims Act is that it was considered unnecessary. We do

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through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

not, therefore, consider this omission sufficiently significant to require a result contrary to that we have reached.

For the foregoing reasons the order should be affirmed.

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[fol. 19] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of November one thousand nine hundred and forty-nine.

Present: Hon. Augustus N. Hand, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

BERNICE B. FERES, as Executrix, etc., Plaintiff-Appellant,

y.

UNITED STATES, Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 20] [Endorsed:] United States Court of Appeals, Second Circuit. Bernice B. Feres, etc., United States. 61 Judgment. United States Court of Appeals, Second Circuit: Filed Nov. 4, 1949. Alexander M. Bell, Clerk.

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[fol. 21] Clerk's Certificate to foregoing transcript omitted in printing.



[fol. 22] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 13, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

[Endorsed:] Enter Morris Pouser. File No. 54,307, U. S. Court of Appeals, Second Circuit. Term No. 558. Bernice B. Feres, as Executrix under the Last Will and Testament of Rudolph J. Feres, Deceased, Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed January 26, 1950. Term No. 558 O. T. 1949.

(7453)



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# Supreme Court of the United States

October Term, ~~1949~~ 1950

No. ~~100~~ 9

BERNICE B. FERES, as Executrix under the Last Will and Testament of RUDOLPH J. FERES, Deceased,

*Petitioner,*

*against*

THE UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, and Brief in Support Thereof.

MORRIS FOUSER,  
LEXOW & JENKINS,

*Attorneys for Petitioner,*

70 Lafayette Avenue,

Suffern, N. Y.

DAVID H. MOSES,  
*Of Counsel.*

ROBERT E. REW, Jr.,  
*On Brief.*

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# Supreme Court of the United States

OCTOBER TERM, 1949.

No.

BERNICE B. FERES, as Executrix under  
the Last Will and Testament of Ru-  
dolph J. Feres, Deceased,

Petitioner,

against

THE UNITED STATES OF AMERICA.

## PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Jus-  
tices of the Supreme Court of the United States:

The petitioner, above named, respectfully prays to  
this Court for a writ of certiorari directed to the United  
States Court of Appeals for the Second Circuit, to the  
end that this Court may review the decision which  
the said Court of Appeals has rendered in this case;  
and the petitioner respectfully shows to the Court:

### Federal Statute Involved.

This action is brought under the Federal Tort Claims  
Act which is Title IV of Public Law, 601—79th Congress,  
Chapter 753, Second Session, 60 Stat. 843, *et seq.* This  
enactment appeared also in United States Code, Title 28,  
Section 921, *et seq.*, and since September 1st, 1948, is  
part of the new United States Code, Title 28, Secs. 1546B,  
2401B and 2671-2680 inclusive. Reference will be made  
to the sections appearing in the Public Law.

### **Statement of Case.**

This action was brought under the Federal Tort Claims Act to recover for the alleged wrongful death of the petitioner's testator. Deceased was a First Lieutenant in the United States Army and died in a fire that swept the barracks in which he was quartered at Pine Camp, New York, on December 10th, 1947, after hostilities had ceased and removed from the combatant areas (R. 5).

The decedent was the husband of the petitioner who was appointed executrix and authorized to maintain the action (R. 5).

The complaint alleged (R. 6) that the agents of the United States were negligent in assigning the deceased to unsafe quarters because of a defective heating plant which caused the fire, and were further guilty of negligence in the supervision of the fireguard. Other specifications of negligence are alleged including failure to provide a safe place for the decedent to be quartered.

The complaint was filed August 19th, 1948, and no answer was filed by the Government. There was no trial and a motion made on the complaint to dismiss the action on November 8th, 1948. The order dismissing the complaint was entered February 10th, 1949, and on the 5th of April, 1949, appeal was taken to the United States Court of Appeals for the Second Circuit. The United States Court of Appeals on November 4th, 1949, rendered a decision affirming the District Court.

### **Jurisdiction of This Court.**

The jurisdiction to review through the procedure of certiorari the decision of the Court of Appeals in this case is conferred upon this Court by provisions of Title 28, United States Code, Section 1254 and Section 2101.



### **The Question Involved.**

This case brings before this Court the specific question left undecided in *Brooks v. United States*, 337 U. S. 49, 93 L. Ed. 884, May 16th, 1949, as to whether dependents of members of the Armed Services can recover under the Federal Tort Claims Act for death arising out of injuries received which were "incident to their service" and whether a soldier sleeping in a barracks far removed from the combatant areas and after hostilities was under a status equivalent to a soldier on furlough within the meaning of the Act and whether such particular status excluded him and his dependents from the coverage of the Federal Tort Claims Act.

### **The Reasons Why Certiorari Should Be Granted.**

1. This case will present to this Court for the first time for decision the interpretation of the Federal Tort Claims Act which was expressly left open in the *Brooks* case, to wit:

(a) Does the Tort Claims Act cover injuries "incident to service;" and

(b) What is the meaning under the Act of the phrase "incident to service."

2. Since the issue affects the interpretation and application of an important new Federal statute arising and bound to arise in many instances that issue unquestionably ought to be settled and decided by this Court.

3. The Circuit Courts are in conflict on the issues presented in this case.

The Second Circuit in this case and in *Ostrander v. United States*, Fed. 2d , January 11th, 1950, denied recovery to the widow of a soldier who died from the injuries received on an operating table in a hospital



in this country and after hostilities had ceased. The Fourth Circuit in *Jefferson v. United States*, Fed. 2d , December, 1949, denied recovery for injuries to a soldier, arising out of the negligence of a Government employee, while undergoing a gall bladder operation.

In the *Ostrander* case, counsel for the petitioner here is counsel in that case and a petition for certiorari in the *Ostrander* case will be filed promptly. In the *Jefferson* case, counsel has been advised that a petition for certiorari will likewise be filed promptly.

On the contrary, the Tenth Circuit in *Griggs v. United States*, Fed. 2d , November 16th, 1949, permitted the wife of a soldier to recover for the death of her husband who died as a result of injuries received while under treatment in an army hospital at Scott Field, Illinois after hostilities had ceased. Counsel has advised that the Government intends to petition for certiorari in this case. In *Santana v. United States*, 175 Fed. 2d 320, June 10th, 1949, 17 Negl. Cases 89, the wife of a veteran was permitted to recover where the decedent had received injuries while a patient in a veterans' hospital after hostilities had ceased. Counsel has not been advised yet whether the Government will petition for certiorari in this case.

4. This case is thus one of great public interest and concern involving an important and novel question of Federal law which calls for the attention and judgment of this Court.

5. This case presents the issue as to whether the Federal Tort Claims Act is to be applied only to soldiers (and their dependents) who are on furlough and denied to thousands or millions of others who are members of the Armed Services and who may not be on furlough but under some other status.

6. This case should be reviewed and decided by this Court because it is respectfully submitted that it has been wrongfully decided by the Court of Appeals below contrary to the wording of the Act, its legislative history and purpose and creating distinctions and exceptions not warranted and throwing the application of the Act into confusion.

WHEREFORE, upon the foregoing and upon the annexed brief, a writ of certiorari should be issued under the seal of this Court to review the decision of the Court below.

Dated: January 24th, 1950.

BERNICE B. FERES,  
As Executrix under the Last Will  
and Testament of Rudolph J. Fe-  
res, Deceased, Petitioner,

By: MORRIS POUSSER

DAVID H. MOSES

LEXOW & JENKINS

Attorneys for Petitioner

Office & P. O. Address

70 Lafayette Avenue

Suffern, New York

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## TRANSCRIPT OF RECORD

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### Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. 538 9

BERNICE B. FERES, AS EXECUTRIX UNDER THE  
LAST WILL AND TESTAMENT OF RUDOLPH J.  
FERES, DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

PETITION FOR CERTIORARI FILED JANUARY 26, 1950.

CERTIORARI GRANTED MARCH 13, 1950.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 558

BERNICE B. FERES, AS EXECUTRIX UNDER THE  
LAST WILL AND TESTAMENT OF RUDOLPH J.  
FERES, DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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[fol. 1]

**IN UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

BERNICE B. FERES, as Executrix under the Last Will and  
and Testament of Rudolph J. Feres, Deceased, Plain-  
tiff-Appellant,

v.

THE UNITED STATES, Defendant-Appellee

**STATEMENT UNDER RULE 15**

The action was commenced August 19, 1948.

The plaintiff is Bernice B. Feres, as Executrix under the Last Will and Testament of Rudolph J. Feres, deceased, and the defendant is the United States. There has been no change in the parties since the commencement of the action.

The complaint was filed August 19, 1948. No answer has been filed as this appeal is made from an order dismissing plaintiff's complaint on a motion by defendant.

The defendant has not been arrested, no bail has been taken and no property has been attached or arrested.

There has been no trial, and the motion which gave rise to the order appealed from was argued before Hon. Stephen W. Brennan, United States District Judge, Northern District of New York, on November 8, 1948.

No question was referred to a commissioner, master or referee.

The order dismissing the complaint was entered February 10, 1949.

The appeal was taken April 5, 1949.

---

[fol. 2] **IN UNITED STATES DISTRICT COURT, NORTHERN DIS-  
TRICT OF NEW YORK**

**ORDER APPEALED FROM.—Filed February 10, 1949**

This cause came on for hearing on defendant's motion to dismiss the action because the court lacks jurisdiction of the subject matter of the action for the reason that this is a suit brought against the United States of America



which has not consented to be sued or waived its immunity from suit under the circumstances alleged in the complaint and on the ground that the complaint fails to state a claim against the defendant upon which relief can be granted and the Court having heard the argument of counsel and being fully advised, it is

Ordered that the defendant's motion be and the same hereby is granted and that the complaint be and it is hereby dismissed and the action be and it is hereby dismissed.

Dated: Utica, New York, February 10, 1949.

Stephen W. Brennan United States District Judge.

---

[fol. 3] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

Appearances:

Morris Pouser, Attorney for Plaintiff, 101 Washington Avenue, Endicott, New York.

Irving J. Higbee, United States Attorney, Attorney for Defendant, Federal Building, Syracuse, New York; Mr. Port, of Counsel.

Motion to Dismiss Complaint.

Argued November 8, 1948; Submitted December 1, 1948; Decided January 5, 1949.

DECISION OF BRENNAN, D. J.

BRENNAN, D. J.:

Plaintiff brings this action under the provisions of the Federal Tort Claims Act, 28 U. S. C. A. 921, etc., to recover a money judgment by reason of the death of her husband, Rudolph J. Feres, on December 10, 1947.

The decedent, a First Lieutenant in the United States Army, was on active duty at the military post known as Pine Camp, New York. It is alleged that on December 10, 1947 the barracks building in which the defendant was quartered was destroyed by fire, due to the negligence of those employees of the defendant charged with the maintenance of said structure. Lieutenant Feres died in the fire.

The defendant moves to dismiss the complaint because of the lack of jurisdiction in this Court of the subject [fol. 4] matter of the action, and upon the ground that the complaint fails to state a claim upon which relief can be granted.

The question involved in this motion is whether or not the action may be maintained under the Federal Tort Claims Act.

An examination of the Act itself and the reported cases which have been urged as precedents upon this motion all indicate that the determination of the question is a close and difficult one. It is the Court's information that all final decisions which have resolved the question are awaiting appellate court action and interlocutory orders are awaiting the trial of the actions and possible subsequent appeal. Under such circumstances, it would seem unwise to discuss the matter at length since it is evident that forthcoming decisions will resolve any existing difference of opinion.

The conclusion is reached that the motion must be granted upon the authorities of *United States v. Brooks*, 169 F. 2d 840, and *Jefferson v. United States*, 77 F. Supp. 706.

Order may be submitted accordingly.

Stephen W. Brennan, U. S. D. J.

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[fol. 5] IN DISTRICT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF NEW YORK

### COMPLAINT

Plaintiff complains of the defendant and alleges:

1. The action arises under the Federal Tort Claims Act, 28 USCA 921 *et seq.*; Chapter 753, Title IV, Section 410, 60 Stat. 843, Laws of 1946; amended August 1, 1947, Chapter 446, Section 1, 61 Stat. 722.

2. Heretofore and on May 24, 1948, the Surrogate's Court of Broome County, State of New York, did duly issue and grant to plaintiff, Bernice B. Feres, Letters Testamentary upon the estate of Rudolph J. Feres who died a resident of Broome County as hereinafter set forth; and

Bernice B. Feres, the plaintiff, has duly qualified as such executrix, and is duly authorized to maintain this action.

3. At all of the times hereinafter mentioned, Rudolph J. Feres was in the employ of the defendant as a First Lieutenant in the Army of the United States, and was compelled to and did, as such employee, work and be quartered at military posts maintained by the defendant and was compelled to and did maintain his quarters in such places as designated by the defendant, and its employees.

4. On December 10, 1947, the aforesaid Rudolph J. Feres, while on active duty in service of the United States, was killed by fire in a barracks in Pine Camp, New York, a military post or station of the United States, to which barracks the decedent had been assigned and required to be quartered in by his superior officers who are or were employees of the defendant, acting within the scope of their office or their employment.

5. Upon information and belief, the said fire which caused decedent's death was caused by a defective heating plant in said barracks in which decedent was quartered.

6. The employees of the defendant, while acting within the scope of their office or employment, were negligent in assigning and requiring said Rudolph J. Feres to be quartered in a barracks which said employees well knew, or should have known, was unsafe due to a defective heating plant, and in failing to furnish said decedent a safe and proper place to work and in which to be quartered while in the employ of the defendant; and an employee of the defendant was negligent while acting within the scope of his office or employment in neglecting and omitting to perform his duties as fire guard of the area in which aforesaid barracks was situated, and in failing and neglecting to observe the said fire or to warn the decedent of the said fire; and the employees of defendant, while acting within the scope of their office or employment, were negligent in failing properly to supervise the said fire guard and to direct the manner in which he performed his duties and in failing to provide a competent fire guard for the area in which the said barracks in which decedent was killed were situated.

7. Decedent, Rudolph J. Feres, left him surviving a widow, Bernice B. Feres, of the age of 29 years, who is

plaintiff herein, and his infant son, Ward B. Feres, born December 25, 1946; Rudolph J. Feres was 31 years of age at the time of his death, and prior thereto, was in good health and in possession of all of his faculties and was employed as a First Lieutenant in the Army of the United States; that said widow and infant child were dependent [fol. 7] on said Rudolph J. Feres for their maintenance, support and education, and that they have been damaged by his death in the amount of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, plaintiff demands judgment against the defendant for the sum of One Hundred Thousand Dollars (\$100,000.00) interest and costs.

Morris Pouser, Attorney for Plaintiff, Office & P. O.  
Address: 101 Washington Avenue, Endicott, New  
York.

[fol. 8] IN DISTRICT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF NEW YORK

#### NOTICE OF MOTION TO DISMISS

Please Take Notice that the undersigned will move this Court at the Court Room, Federal Building, Syracuse, New York, on the 8th day of November, 1948, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order (1) dismissing the action because the Court lacks jurisdiction of the subject matter of the action for the reason that this is a suit brought against the United States of America which has not consented to be sued or waived its immunity from suit under the circumstances alleged in the complaint and (2) to dismiss the action on the ground that the complaint fails to state a claim against the defendant upon which relief can be granted.

Yours, etc., Irving J. Higbee, United States Attorney,  
Attorney for Defendant, Office & P. O. Address: Federal Building, Syracuse 1, New York.

To: Morris Pouser, Attorney for Plaintiff, 101 Washington Avenue, Endicott, New York.

[fol. 9] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL

Notice is hereby given that Bernice B. Feres as Executrix under the Last Will and Testament of Rudolph J. Feres, deceased, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order dismissing the complaint herein entered in this action on the 10th day of February, 1949.

Dated, Endecott, New York, April 5, 1949.

Morris Pouser, Attorney for Appellant, Bernice B. Feres, as Executrix. Office & P. O. Address, 101 Washington Avenue, Endicott, New York.

[fol. 10] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

STIPULATION AS TO RECORD

It is hereby stipulated by and between the attorneys for the plaintiff and the defendant that the Record on Appeal in the plaintiff's appeal to the United States Circuit Court of Appeals for the Second Circuit from the Order of this Court dated February 10, 1949, dismissing the plaintiff's complaint herein, shall contain the following: The Order dismissing the plaintiff's complaint dated February 10, 1949; the Decision of Hon. Stephen W. Brennan, District Judge, dated January 5, 1949; the Plaintiff's Notice of Appeal; the Plaintiff's Complaint; the Defendant's Notice of Motion and this Stipulation.

Dated, June 23, 1949.

Morris Pouser, Attorney for Plaintiff, Office & P. O. Address, 101 Washington Avenue, Endicott, New York. Irving J. Higbee, United States Attorney, Attorney for Defendant, Office & P. O. Address, Federal Building, Syracuse 1, New York.



[fol. 11] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true copy of the transcript of the record on appeal of the said District Court in this action as agreed on by the parties.

Dated: July 5, 1949.

Morris Pouser, Attorney for Appellant, Office and Post Office Address, 101 Washington Avenue, Endicott, New York. Irving J. Higbee, United States Attorney, Attorney for Appellee, Office and Post Office Address, Federal Building, Syracuse 1, N. Y.

[fol. 12] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 13] UNITED STATES COURT OF APPEALS FOR THE SECOND  
CIRCUIT, OCTOBER TERM, 1949

No. 61

(Argued October 10, 1949. Decided November 4, 1949)

Docket No. 21426

BERNICE B. FERES, as Executrix under the Last Will and  
Testament of Rudolph J. Feres, Deceased, Plaintiff-  
Appellant,

against

THE UNITED STATES, Defendant-Appellee

Before: Augustus N. Hand, Chase and Frank, Circuit  
Judges.

Appeal from the United States District Court for North-  
ern District of New York

From an order dismissing the above entitled action  
brought under the Federal Tort Claims Act, the plaintiff  
appeals. Affirmed.

[fol. 14] Morris Pouser, Attorney and counsel for  
Plaintiff-Appellant. H. G. Morison, Assistant At-  
torney General, Irving J. Higbee, United States  
Attorney, Edmond Port, Assistant United States  
Attorney, and Paul A. Sweeney, Massillon M.  
Heuser and Morton Hollander, Attorneys, Depart-  
ment of Justice, for Defendant-Appellee.

AUGUSTUS N. HAND, Circuit Judge:

This is an appeal from an order dismissing an action  
brought by the executrix under the will of Rudolph J. Feres,  
deceased, against the United States to recover damages  
under the Federal Tort Claims Act. The decedent, an  
army lieutenant, while on active duty in the service of the  
United States, was killed by fire in a barracks in Pine Camp,  
New York, a military post of the United States in which he  
had been required to be quartered by superior officers.

The complaint alleged negligence on the part of the offi-  
cers who required the deceased to be quartered in barracks

Furthermore, the argument of the Government completely ignores the proposition that there is no vested right to a pension or other benefit which is merely a bounty from a grateful Government which Congress could recall, limit, destroy or change (*In re Lindquist Estate*, 144 Pac. 2d 438, 154 Pac. 2d 879, Cert. denied 325 U. S. 869, 89 L. Ed. 1988).

The argument of the Government is that a *dependent* of a soldier has no *rights* under the Federal Tort Claims Act because the soldier may have some *privileges* under some other acts enacted at different times and for totally unrelated circumstances and purposes.

In the *Brooks* case, *supra*, the soldiers were on furlough yet recovery was allowed.

In *Santana v. United States*, 175 Fed. 2d 320, the United States Court of Appeals, First Circuit, June 10, 1949, 17 Negl. Cases 89, the soldier was a discharged veteran and received injuries at a veteran's hospital which resulted in his death when he returned for medical treatment, yet the Court of Appeals said he was entitled to recovery.

In *Griggs v. United States*, the Court of Appeals for the Tenth Circuit Fed. 2d , November 16, 1949, 17 Negl. Cases 562, the soldier was not on combat duty and was admitted under official orders to the army hospital at Scott Field Air Base at Illinois for the purpose of surgery and treatment. While at that hospital and performing no military service, after hostilities had ceased, he received injuries caused by the negligence and unskillful acts of members of the army Medical Corps, acting within the scope of their office of employment, from which he died. His legal representative was held entitled to maintain an action under the Federal Tort Claims Act.

There are other cases in the District Courts allowing recovery.

*Alansky v. Northwest Air Lines*, 77 Fed. Supp. 556.

*Skeeles v. United States*, 72 Fed. Supp. 372.

*Sampson v. United States*, 79 Fed. Supp. 406.

We do not think that Congress intended the subtle and fine distinctions in the application of the Act which have now grown up by these various decisions.

If we adopt the philosophy and construction of the Court below in this case, a deserter, or his dependents, would be entitled to recovery but the plaintiff in this case would not be. Not only is this result unwarranted but such construction is throwing the application of the Act into confusion.

The proximate cause of decedent's death was the negligence of a third party, an employee of the Government, and not the performance of any duty as a soldier.

If it were intended to draw distinctions between members of the Armed Services, depending upon their different status at different times as to whether they are entitled to recovery, it would have been very easy for Congress to have said so. It is not for the Courts to draw these distinctions and exceptions, nor should they be a part of the Act except by further congressional action if reasons of policy or otherwise require it.

Upon all that is herein set forth, the petitioner prays that her application for a writ of certiorari should be granted and that the decision of the Court below should be reviewed and reversed.

Respectfully submitted,

MORRIS POUSER,  
LEXOW & JENKINS,  
Attorneys for Petitioner,  
Office & P. O. Address,  
70 Lafayette Avenue,  
Suffern, New York.

DAVID H. MOSES,  
Of Counsel.

ROBERT E. REW, JR.,  
On Brief.



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**FILED**

**SEP 21 1950**

**CHARLES ELMORE GROMLEY**

**CLERK**

# **Supreme Court of the United States**

**October Term, 1950.**

**No. 9.**

**BERNICE B. FERES**, as Executrix under the Last Will  
and Testament of **RUDOLPH J. FERES**, Deceased,  
*Petitioner,*

**vs.**

**THE UNITED STATES OF AMERICA.**

**On Writ of Certiorari to the United States Court of  
Appeals for the Second Circuit.**

**BRIEF FOR PETITIONER.**

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POINT I. The Federal Tort Claims Act gave the District Court jurisdiction of "any claim" against the United States. Since the petitioner was not excluded by any of the exceptions, the District Court below had jurisdiction of her claim for the negligent death of her husband caused by an act or omission of an employee of the Government. Neither the act as written, its legislative history or avowed purpose permitted the Court below to read into the Act an exception that was not there ..... 5

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# Supreme Court of the United States

OCTOBER TERM, 1950.

No. 9.

BERNICE B. FERES, as Executrix under  
the Last Will and Testament of  
Rudolph J. Feres, Deceased,  
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT.

## BRIEF FOR PETITIONER.

### Opinion in the Court Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 177 F. 2d 535 (Record, p. 8). The opinions of the United States District Court for the Northern District of New York are unreported, which appears in the record, page 2.

### Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit was entered on the 4th of November, 1949. Petition for certiorari was filed January 26th, 1950. Certiorari was granted by this Court on March 13th, 1950. Jurisdiction was based upon Sections 1254 and 2101 of Title 28, United States Code. This case presents a situation where the United States Court of



Appeals for the Second Circuit has rendered a decision in conflict with another United States Court of Appeals on the same matter. See *Griggs v. United States*, 178 F. 2d 1.

### **Statement of the Case.**

This action was brought under the Federal Tort Claims Act to recover for the alleged wrongful death of the petitioner's testator. Deceased was a First Lieutenant in the United States Army and died in a fire that swept the barracks in which he was quartered at Pine Camp, New York, on December 10th, 1947, after hostilities had ceased and removed from the combatant areas (R. 5).

The decedent was the husband of the petitioner who was appointed executrix and authorized to maintain the action (R. 5).

The complaint alleged (R. 6) that the agents of the United States were negligent in assigning the deceased to unsafe quarters because of a defective heating plant which caused the fire, and were further guilty of negligence in the supervision of the fireguard. Other specifications of negligence are alleged including failure to provide a safe place for the decedent to be quartered.

The complaint was filed August 19th, 1948, and no answer was filed by the Government. There was no trial and a motion made on the complaint to dismiss the action on November 8th, 1948. The order dismissing the complaint was entered February 10th, 1949, and on the 5th of April, 1949, appeal was taken to the United States Court of Appeals for the Second Circuit. The United States Court of Appeals on November 4th, 1949, rendered a decision affirming the District Court.

### Federal Statute Involved.

The Federal Tort Claims Act is Title IV of Public Law, 601—79th Congress, Chapter 753, Second Session, 60 Stat. 843, *et seq.* (United States Code, Title 28, Section 921, *et seq.* On 1 September 1948, while this action was pending, the new Judicial Code became effective. In it the provisions of the Act were recodified as Sections 1346 (b), 2401 (b) and 2671-2680. Since the rights of litigants of impending actions are preserved as they were under the prior law (Section 2 [b] of Act of 25 June 1948, P. L. 773, 80th Congr., 2d Sess.), we will refer to the Sections in the Act as originally enacted. (See Appendix).

### Questions Presented.

In *Brooks v. U. S.*, 337 U. S. 49, 93 L. Ed. 1200, this Court held that the Government is liable under the Federal Tort Claims Act to a soldier on furlough for injuries then tortiously inflicted by other military personnel. The question presented here is:

Is a soldier sleeping in barracks removed from combatant areas after hostilities have ceased under the protection of the Federal Tort Claims Act so that his widow and dependents may recover damages for his death caused by the negligence of the employees of the United States Government acting within the scope of their employment?

In the *Brooks* case, this Court answered in the affirmative the question as to whether members of the United States armed forces were under the coverage of the Act. This Court, however, expressly reserved the question as to whether the Act applied to accidents which were incident to the soldier's military service, stating by way of dicta (p. 52):

"But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired."

The question presented, therefore, is whether the Federal Tort Claims Act made a distinction as to coverage depending upon the soldier's particular activity at the time of the injury or death and whether if the soldier is disqualified while a soldier from suing under the Act is this disqualification grafted over to his widow and dependents.

### **Summary of Argument.**

The Federal Tort Claims Act as written gives the District Court jurisdiction of petitioner's claim. The legislative history shows that the purpose of the Federal Tort Claims Act was to relieve Congress from considering thousands of bills introduced each year for claims against the Government arising out of multitude of circumstances, including those of the armed services and their dependents. The history of the enactment shows that Congress had considered members of the armed forces. The exception that the Court below has read into the Act was once excluded by Congress. The Act is a general waiver of immunity intended to do away with the old practice of waiving sovereign immunity by special Act of Congress. It follows the trend of the last 25 years of the Government waiving sovereign immunity as their activities expand.

Since a soldier is on duty at all times as a member of the armed forces until discharged or separated from the service, the Act creates no distinction upon the right of the plaintiff to sue depending upon the particular activity of the soldier at the time of the Act complained of, except those of the combatant nature. Since this Court

has decided that a soldier on furlough is entitled to sue under the Act, it necessarily follows that all other soldiers, so long as they have the status of the soldier, are likewise entitled to sue under the Act. Assuming for reasons of military discipline, a soldier should not sue while a member of the armed forces, this disability is not grafted to his widow and children, the petitioners here.

The fact that the Government has given to soldiers and their dependents certain *privileges* by other Federal statutes cannot be considered a substitute to or an exclusion of the *right* granted under the Federal Tort Claims Act.

The decisions relied upon by the Court below are those under an unrelated Act passed more than 25 years ago which Acts were limited waivers of immunity and not the broad general waiver of immunity as the Federal Tort Claims Act.

## ARGUMENT.

### POINT I.

The Federal Tort Claims Act gave the District Court jurisdiction of "any claim" against the United States. Since the petitioner was not excluded by any of the exceptions, the District Court below had jurisdiction of her claim for the negligent death of her husband caused by an act or omission of an employee of the Government. Neither the act as written, its legislative history or avowed purpose permitted the Court below to read into the act an exception that was not there.

The Act, Section 410, gives the District Court exclusive jurisdiction to hear, determine and render judgment without a jury "on any claim against the United States.

for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred."

In Section 402, an employee of the Government is defined as follows:

"(b) 'Employee of the Government' includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."

This Court, in *Brooks v. United States*, 337 U. S. 49, unequivocally stated (p. 51):

"The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. Sec. 421. None exclude petitioners' claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim.' It would be absurd to believe that Congress



did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions makes this plain."

(a) Under familiar canons of instructions, the Act does not need interpretation and should be administered as written.

The proper viewpoint is well expressed, with citations of numerous authorities, in 50 Am. Jr., pages 204-207, as follows:

"A statute is not open to construction as a matter of course \* \* \*. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning \* \* \* the Court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the Courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

Mr. Justice Holmes, in *United States v. Pulaski Co.*, 243 U. S. 97, stated (p. 106):

"There is a strong presumption on that the literal meaning is the true one, especially as against ~~literal~~ construction that is not interpretation, but perversion; that takes from the proviso its ostensible purpose to impose a condition precedent. \* \* \*"

Another familiar canon of statutory construction that when the meaning of the statute is plain the sole function

of the Courts is to enforce its terms. See *Caminetti v. U. S.*, 242 U. S. 470, 485; *Osaka Shosen Kaisha Line v. U. S.*, 300 U. S. 98, 101.

In *Equitable Life Assurance Society v. Pettus*, 140 U. S. 226, 233, 35 L. Ed. 497, 500, 11 S. Ct. 822, 825, the Court said:

"This construction is put beyond doubt by section 5986 which, by specifying four cases—in which the three preceding sections 'shall not be applicable' necessarily implies that those sections shall control all cases not so specified."

The specific exclusions, therefore, carry the implication that all claims not thus excluded may be successfully asserted.\*

(b) *The legislative history precludes the construction put upon the Act by the Court below.*

This Court in the *Brooks* case stated (p. 50):

"More than the language and framework of the act support this view. There were eighteen tort claims bills introduced in Congress between 1925 and 1935.<sup>2</sup> All but two<sup>3</sup> contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was first introduced, the exception concerning servicemen had been dropped.<sup>4</sup> What remained from previous bills was an exclusion of all claims for which compensation was provided by the World War Veterans Act of (June 7) 1924—43 Stat. 607, c. 320, 38 U. S. C. A. Sec. 421, 11 F. C. A. title 38, Sec. 421, compensation for injury or death occurring in the first World War. H. R. 181, 79th Cong. 1st Sess. When H. R. 181 was incorporated into the Legislative Reorgani-

\* Volume 33, American Bar Association Journal (p. 962):

"When these exceptions are considered, we are left in the field of negligence of governmental agents in (a) the operation of motor vehicles; and (b) the maintenance, operation, and control of highways, bridges, public lands, building, and structures of all kinds."

zation Act, the last vestige of the exclusion for members of the armed forces disappeared. See also Note, 1 Syracuse L. Rev. 87, 93, 94.

Congress specifically considered and deliberately rejected an exception having exactly the same effect as that which the Court below now writes into the Act. This is to be seen undeniably in the following circumstances:

The original predecessor of the Federal Tort Claims Act was a bill, H. R. 7236, introduced in the 76th Congress. It, like the present law, provided for general waiver of the Government's immunity to tort suits and in it there were listed substantially the same twelve exceptions and exclusions which appear in the present Act. But, in addition to these, there was at that time another exception proposed which would have excluded from the coverage of the Act:

"Any claim for which compensation is provided by the \* \* \* World War Veterans' Act of 1924, as amended."

The theory of this exception, just as the Government now urges in support of the lower Court's decision in the present case, was that the World War Veterans' Act of 1924, as amended, confers certain governmental benefits, such as the right to compensation payments, upon all persons injured while in the armed services of the United States, and therefore such persons should not also have the benefit of a general statute permitting tort suits against the Government. The clear purpose and effect of the proposed exception was thus to exclude all members of the armed services from rights of action under the contemplated statute. Conversely, it seems to have been considered obvious (see Congressional Record, Vol. 86, Pt. II, 76th Congress, 3d Sess., 1940, pp. 12015-12032, and see also footnote, p. 212, *Jefferson v. United States*, 74 F. Supp. 209), that under the proposed statute's general opening of the way to tort suits against the Gov-

ernment, members of the armed services would be able to sue like all other persons unless some such exception was expressly written into the statute. Though debated, the bill was, of course, not enacted by the 76th Congress.

In the 79th Congress, the same bill, retitled "H. R. 181, was again introduced with all its exceptions including the additional, or thirteenth, exception quoted and discussed above. Congress again considered the bill, *struck out of it the exception in question*, and enacted the remainder as the present Federal Tort Claims Act.

The Federal Tort Claims Act, as its history partially outlined above indicates, was no hasty or ill-considered piece of legislation. The Court below was in error to assume that when Congress gave its attention to the subject of exceptions or exclusions from the Act and carefully etched out twelve such exceptions, it overlooked and failed to mention a thirteenth exception which it really intended. Certainly and above all, the Court below erred when it disregarded the fact that Congress did consider such thirteenth exception. And for the Court below to write the effect of that exception back into the statute after Congress deliberately and specifically struck it out, is unjustifiable.

In the Report of the Joint Committee pursuant to H. Con. Res. 18, 79th Congress, 2d Session, House Report No. 1675, it is stated at page 25:

## "2. Delegation of Private Claims.

"Recommendation: That Congress delegate authority to the Federal courts and to the Court of Claims to hear and settle claims against the Federal Government; and that Government agencies and departments be empowered to handle local and private matters now provided for in private bills, such as private pension bills and legislation authorizing construction of bridges over navigable streams."

“Congress is poorly equipped to serve as a judicial tribunal for the settlement of private claims against the Government of the United States. This method of handling individual claims does not work well either for the Government or for the individual claimant, while the cost of legislating the settlement in many cases far exceeds the total amounts involved.

“Long delays in consideration of claims against the Government, time consumed by the Claims Committees of the House and Senate, and crowded private calendars combine to make this an inefficient method of procedure.

“The United States courts are well able and equipped to hear these claims and to decide them with justice and equity both to the Government and to the claimants. We, therefore, recommend that *all claims for damages* against the Government be transferred by law to the United States Court of Claims and to the United States District Courts for proper adjudication.

“We further recommend that private pension bills and other bills dealing with purely local and private matters, including the authority to construct bridges over navigable streams, be delegated to the proper agencies of government for final determination.” (Italics ours.)

In the Senate Report No. 1400 to accompany S. 2177, at pages 18 and 19, it is stated:

“Part 2. Provisions Applicable to Both Houses.

“Section 121. Private bills banned.

“This section bans private bills, resolutions and amendments authorizing or directing the payment of property damages for personal injuries *or death or for pensions*; the construction of bridges across navigable streams; or the correction of military or naval records. It is provided, however, that the provisions of this section shall not apply to private bills or resolutions conferring jurisdiction on the Federal courts to hear, determine, and render judgment in connection with private claims



otherwise cognizable under the Federal Tort Claims Act if the claim accrued between January 1, 1939, and December 31, 1944, the last day being the day before the effective date (for the purpose of accrual of claims) of the Federal Tort Claims Act. This will permit consideration of bills or resolutions covering claims going back for a period of 6 years and would seem to be ample to prevent any inequities." (Italics ours.)

Page 29: °

"Title IV—Federal Tort Claims Act.

"This title waives, with certain limitations, governmental immunity to suit in tort and permits suits on tort claims to be brought against the United States. It is complementary to the provision in title I banning private bills and resolutions in Congress, leaving claimants to their remedy under this title."

Therefore it seems evident to us that Congress wanted to rid itself of the great number of private bills for relief of military personnel and their families presented at every session.

Several cases arising under the Act have been interpreted as its primary purpose or intention to relieve Congress of the burden of dealing by private acts tort claims and construction put upon the Act by the Court below and the Government defeats that purpose.

*United States v. South Carolina State Highway Dept.*, 171 Fed. 2d 893.

*State Farm Mutual Liability Insurance Co. v. United States*, 172 Fed. 2d 737.

The position now assumed by the Government in litigation under the Act is at variance with the original purpose of the Act as so indicated by Congress.

For the first time in the history of this country has there been peacetime conscription\* and the present activities of the Federal Government reach corners never dreamt of by the founding fathers. It should not seem unusual that co-related with this extension of Government activity that there should be assumed Government liability and waiver of immunity from suit.

The Act is a general waiver of immunity intended to do away with the old practice of waiving sovereign immunity by special act of Congress. It follows the trend of the last twenty-five years of waiving Government immunity as Government activities multiply.

The proper view of the Act we submit is as stated in *Griggs v. United States*, 178 F. 2d, page 3:

"With deference to the views of the learned judge, in the *Jefferson* case, we fail to find anything in the context of the Act or its legislative history justifying judicial limitation upon the claims of servicemen. As pointed out in the *Brooks* case, there were eighteen tort claims bills introduced in Congress between 1925 and 1935, all but two of which contained provisions expressly exempting claims of members of the armed forces. When, however, the Congress finally came to confer jurisdiction of the District Courts over tort claims against the United States, it conspicuously omitted to exclude claims growing out of a government-soldier relationship. We think the only logical conclusion is that it deliberately refrained from doing so. If the result of its omission to exempt such claims leads to dire consequences and absurd results, it is for Congress and not this Court to provide rational limitations."

\* "Armed forces of 2,300,000, still goal for the year" (N. Y. Times, Sunday, Sept. 10th, 1950).

## POINT II.

Since a soldier is on duty at all times, irrespective of his particular activity or non-activity, the decision in the *Brooks* case is controlling here.

Since this Court in the *Brooks* case has held that a soldier on furlough is entitled to sue, they have recognized that the Act creates no distinction dependent upon the particular activity of the soldier at the time of the act complained of (except those in the exceptions). The decision that a soldier on furlough is covered by the Act carried with it the necessary implication that all soldiers must be likewise covered.

While he has the status of a soldier, his particular activities or non-activities may vary from time to time. He may be performing the duties of a soldier of the widest variety, from training\* to combatant service. A soldier may be on furlough, as the soldier in the *Brooks* case, or he may be in the hospital, unconscious on the operating table, as the soldier in the *Jefferson* case (178 Fed. 2d 518, cert. granted March 13th, 1950, No. 381), and the soldier in the *Ostrander* case (No. 33, October Term, 1950, application for certiorari to the Second Circuit Court is pending undecided before this Court), or he may be a soldier sleeping in the barracks far removed from combatant areas, as the soldier in this case. The soldier's status is that of a member of the armed

\* In *Skeels v. U. S.* 72 Fed. Supp. 372, combatant activities were construed to mean actual conflict. If Congress intended to exclude activities arising out of training activities, it would have been easy to have said so for they did exclude combatant activities as well as those arising out of duties of a discretionary nature.

forces until separated by discharge or retirement, if he obeys its laws and regulations. Once inducted into the army, his status is that of a soldier and not of a civilian and hence a decision in the *Brooks* case should be decisive of the issue here.

Is it to be assumed that Congress intended to include soldiers covered by the Act while on furlough or some other similar status but not when sleeping in a barracks or performing some other activity? The error of the Court below is in assuming that the Act created the distinction between a soldier who was on active duty and one who was not. There is nothing in the wording of the Act that creates this distinction; on the contrary, the exceptions where the Act does not apply are specifically set forth in meticulous detail in Section 421 thereof.

What the Court below overlooked is that a soldier is on duty at all times irrespective of his particular activity at the time.

There is no doubt whatever that a soldier on furlough is on active duty. He receives army pay and allowances (see The Judge Advocate General School's Text No. 3, "Military Affairs," p. VIII-25), is subject to the Articles of War and courts-martial (see Manual for Courts-Martial, U. S. Army, 1949, par. 10, pp. 10-11), and is entitled to army hospitalization and medical care (see second Fourth Circuit decision in *Brooks* case, 176 F. 2d 482). If injured while on furlough and discharged from the army, he is entitled to benefits under the Veterans Act only because he was disabled in line of duty while on *active* duty. Active duty status is one of the prerequisites of the Veterans Act of 1924, as amended, which provides for the payment of disability benefits (38 USCA 701 [a]) to:

"(a) Any person who served in the active military or naval service and who is disabled as a

result of disease or injury or aggravation of a pre-existing disease or injury incurred in line of duty in such service."

If fatally injured while on furlough, his legal representative is entitled to the six months' death gratuity (10 USCA 903 and 456.a). These benefits inure to the soldier on furlough, as was illustrated in the *Brooks* case, solely because he was on active duty and was injured "in line of duty." The theory is set out in *Moore v. U. S.*, 48 Ct. Clms. 110, 113:

"As a general proposition, we believe a soldier is in line of duty until separated from the service by death or discharge, if during such time he is submitting to all of its laws and regulations. \* \* \* The provisions for furloughs or leaves of absence are a part of the disciplinary regulations of the military service, and no more separate a man from the service than an order to report to a different command."

For the historical development of the rule see the Judge Advocate General's School Text No. 3, "Military Affairs" (1943 ed.), pp. X-26 to X-34.

In the Court below the Government contended in its brief at page 16:

"The Supreme Court has stated that while on leave, a serviceman 'is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses.' *United States v. Williamson*, 23 Wall. 411, 415. The leave 'is a favor extended for his sole accommodation' to permit him to 'enjoy a respite from military duty.' *Foster v. United States*, 43 C. Cls. 170. 'A leave of absence or a furlough is a favor extended. A soldier cannot have a furlough forced on him.' *Hunt v. United States*, 38 C. Cls. 704, 710."



We, therefore, argue that if a furlough is merely a favor extended to the soldier it cannot be concluded then that it is such a radical change in his status as to again make him a civilian for the purpose of the Federal Tort Claims Act. The Government argued that much when in its brief before this Court in the *Brooks* case it stated (p. 18):

“The soldier is subject to military discipline even while at play, and his desertion is a serious crime, punishable at times by death.”

(p. 29):

“Even in the absence of such statutory extension, it has been recognized that a serviceman is entitled to compensation benefits for injuries sustained while he was away from duty and on leave, inasmuch as the military relationship is continuous and is not broken because of a pass. ‘A pass granting temporary leave for recreational purposes cannot change this status any more than a leopard can change its spots. It would be *dehors* the principles of military science if it were otherwise.’ *Globe Indemnity Co. v. Forrest*, 165 Va. 267, 272.”

The Court of Appeals for the District of Columbia in *Wham v. United States*, 180 Fed. 2d 38, cited the case at bar but refused to follow it, pointing out the same error as we have.

In that case a police officer of the District of Columbia was injured while on duty by a Treasury Department vehicle, driven by a Treasury Department employee. An action was brought under the Tort Claims Act. The policeman was eligible for various special benefits under Federal statutes but the Court refused to apply the doctrine of the Circuit Court below in the case at bar or the doctrine of the *Dobson*\* and *Bradey*\* cases, hold-

\* See Point IV infra where these cases are discussed.

ing that the decision by this Court in the *Brooks* case controlled.

The District of Columbia Court of Appeals said that there was no reason to draw a distinction between a soldier on furlough and a soldier acting in the line of duty because on furlough soldiers enjoy the same benefits generally as those on active duty, therefore, there could be no distinction between a policeman on duty or off duty.

See also?

*Santana vs. The U. S.*, 175 Fed. 2nd 320.

What had disturbed some of the Courts below is interference with military discipline and like matters if a soldier was permitted to sue his government. These considerations are not present here because the soldier is not suing. His widow is the plaintiff, the petitioner here.

We may make a general analogy to a person in a jail who undergoes a change in his civilian status while incarcerated as punishment for the crime found guilty of.

Very often penal statutes disable a convict from suing while under the disability of a sentence. The Courts are universal in holding that such disability does not carry over to the convict's family or assignee and that the disability is personal to the convict and is removed when he is no longer under the consequences of his criminal sentence.

See:

*Green v. State of New York*, 278 N. Y. 15.

*Bamman v. Erickson*, 259 A. D. 1040, 21 N. Y. S. 2d 40.

Concededly, the plaintiff was and is not a member of the armed forces. Even if we assume that her husband

was disqualified from suing his employer, the Government, while the relationship of a soldier existed, there is no statute or rule of law which grafts that some disqualification upon her and deprives her of the right to sue under the Federal Tort Act like any other citizen.

### POINT III.

**The privileges granted by Federal statutes are not a substitute to the rights granted by the Federal Tort Claims Act.**

The chief contention of the Government is that Congress must have intended to exclude members of the armed services (and their wives and dependents) because of the growth over the years of a system of pensions and benefits. This argument does not square up fully upon analysis. A reading of the several statutes mentioned does not seem to indicate that the allowances granted thereby are "rights," or that they will be allowed in all cases, especially where the claim is that there is recurrence of a condition or injury received in time of war. 38 U. S. C., Sections 501 (a) and 501 (a-1).

Certain principles govern the determination whether the additional disability results from an injury or aggravation of an existing injury and the claimant must establish causation. 38 C. F. R. Cum. Supp., Section 2.1123 (b).

Although the Government may have been liberal in one sense, in a system of benefits and pensions, the system is not so all-inclusive and complete as to lend support to the contention that it is a complete substitute for a claim under the Federal Tort Act.

Furthermore, the argument of the Government completely ignores the proposition that there is no vested right to a pension or other benefit which is merely a bounty from a grateful government which Congress could recall, limit, destroy or change (*In re Lindquist Estate*, 144 Pac. 2d 438, 154 Pac. 2d 879, cert. denied 325 U. S. 869, 89 L. Ed. 1988).

When the *Brooks* case was remanded to the Circuit Court after the decision of this Court, Chief Judge Parker pointed this out (176 F. 2d 482), stating (p. 484):

"We recognize that prospective disability payments are uncertain in that the government may withdraw or decrease them at any time \* \* \*"

The argument of the Government is that a *dependent* of a soldier has no *rights* under the Federal Tort Claims Act because the soldier may have some *privileges* under some other acts enacted at different times and for totally unrelated circumstances and purposes.

The proceeds of death actions are distributed according to different plans than the distribution of death or disability benefits under the Federal statutes for relief of veterans. Much depends upon who is the survivor, widow, child, parent, etc. For example, see Section 133, Decedent Estate Law, State of New York, Legislative Document No. 65C, New York Legislature, 1949.

Finally, as this Court observed in the *Brooks* case, 337 U. S. 49 (p. 53):

"Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 USCA Sec. 701, 11 FCA title 38, Sec. 701, indicate no purpose to forbid tort actions under the Tort Claims Acts. Unlike the usual workmen's compensation statute, e. g. 33

USCA Sec. 905, 10 FCA title 33, Sec. 905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. *United States v. Standard Oil Co.*, 332 U. S. 301, 91 L. ed. 2067, 67 S. Ct. 1604, indicates that, so far as third party liability is concerned. Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, 5 USCA Sec. 757, 2 FCA title 5, Section 757. Thus *Dahn v. Davis*, 258 U. S. 421, 66 L. ed. 696, 42 S. Ct. 320, and cases following that decision, are not in point. Compare *Parr v. United States* (CCA 10th Kan.), 172 F. 2d 462. We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so. Compare 31 USCA Sec. 224b, 9 FCA title 31, Sec. 224b, specifically repealed by the Tort Claims Act, Sec. 424 (a). In the very act we are construing, Congress provided for exclusiveness of the remedy in three instances, Secs. 403 (d), 410 (b), and 423, and omitted any provision which would govern this case."

#### POINT IV.

**The authorities relied upon by the Court below are not controlling.**

The Circuit Court below in affirming specifically relied upon *Dobson v. United States*, 27 Fed. 2d 807, cert. d. 278 U. S. 653, and *Bradey v. United States*, 451 Fed. 2d 742, cert. d. 326 U. S. 795, as well as *Jefferson v. United States*, 77 Fed. Supp. 706 (cert. granted and argument follows case at bar).

This Court in alluding to the *Dobson* and *Bradey* cases stated in *Brooks v. United States*, 337 U. S. 49 (p. 52):



"But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do *Dobson v. United States*, 27 F. 2d 807, *Bradey v. United States*, 151 F. 2d 742, and *Jefferson v. United States*, 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U. S. C. Sec. 223b. Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U. S. 198."

Argument was made, in the *Brooks* case that Congress was aware of the decision in the *Dobson* and *Bradey* cases and, therefore, when they drew the Federal Tort Act molded its language in accordance with that awareness. In footnote 4 in the *Brooks* opinion, this Court easily disposed of that contention, stating:

"Other bills after those mentioned in note 2 above, also omitted this exception. See, e. g., HR 5373, 77th Cong. 1st Sess.; HR 1356, 78th Cong. 1st Sess. This has nothing to do with 'congressional awareness' of the *Dobson* decision (CCA 2d N. Y.), 27 Fed. 807, and *Bradey* decision (CCA 2d N. Y.), 151 F. 2d 742, both *infra*. The present Tort Claims Act contains exceptions which would have been specifically covered by those cases. Sec. 421 (d)."

The decisions in the *Dobson* and *Bradey* cases are founded upon acts whose legislative history and purpose are no parallel to the Federal Tort Claims Act. The danger in drawing general conclusions from decisions under other statutes is admirably set forth by Mr. Jus-

tice *Frankfurter* in *Federal Trade Commission v. Bunte*, 312 U. S. 349, 353:

“Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business.”

Not only is there a serious difference of wording in the acts interpreted in the *Dobson* and *Bradey* cases, but it must be important to bear in mind that the Federal Tort Claims Act represented a marked departure by the United States with respect to the waiving of sovereign immunity. It is the adoption of the trend of the last twenty-five years or more. The Federal Tort Claims Act is a comprehensive Act or general waiver of immunity. The acts interpreted in the *Dobson* and *Bradey* cases were special acts waiving immunity under certain conditions and to a limited extent.

The same view of the scope of the act has been taken by the Circuit Court of Appeals for the Ninth Circuit in an opinion filed on April 8, 1948, in *Employees' Fire Insurance Co., et al., v. U. S.*, Civil Action No. 11743, 167 F. 2d 655. In reversing a District Court decision that an insurance company had no right of subrogation under the act, the Circuit Court of Appeals said:

“The words of the Act indicate a clear and sweeping waiver of immunity. \* \* \* The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions.”

*United States v. Aetna Cas. & S. Co.*, 94 L. ed. 151 (p. 161):

"In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. John L. Hayes Constr. Co.*, 243 N. Y. 140, 147, 153 N. E. 28: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "

### CONCLUSION.

**The judgment appealed from should be reversed and the case remanded for a trial upon the merits.**

Dated, September 15th, 1950.

Respectfully submitted,

**MORRIS POUSER,**  
Attorney for Petitioner,  
Office & P. O. Address,  
101 Washington Avenue,  
Endicott, New York.

**DAVID H. MOSES,**  
Of Counsel.

**LEXOW & JENKINS,**  
70 Lafayette Avenue,  
Suffern, New York.

## APPENDIX.

### TITLE IV—FEDERAL TORT CLAIMS ACT

#### Part 1—Short Title and Definitions

##### Short Title

Sec. 401. This title may be cited as the “Federal Tort Claims Act.”

##### Definitions

Sec. 402. As used in this title, the term—

(a) “Federal agency” includes the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: *Provided, That this shall not be construed to include any contractor with the United States.*

(b) “Employee of the Government” includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) “Acting within the scope of his office or employment,” in the case of a member of the military or naval forces of the United States, means acting in line of duty.

Part 3—Suits on Tort Claims Against the United States Jurisdiction.

Sec. 410. (a) Subject to the provisions of this title, the United States District Court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States District Courts for the territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

#### Part 4—Provisions Common to Part 2 and Part 3 One-Year Statute of Limitations.

Sec. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding \$1,000; or unless within one year after such



claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to Part 3 of this title. In the event that a claim for a sum not exceeding \$1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to Part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to Section 410 of this title, if it would otherwise expire before the end of such period.

### Exceptions

Sec. 421. The provisions of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., Title 46, Secs. 741-752, inclusive), or the Act of March 3, 1925 (U. S. C., Title

46, Secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

#### Exclusiveness of Remedy

Sec. 423. From and after the date of enactment of this Act, the authority of any Federal agency to sue and be sued in its own name shall not be construed to authorize suits against such Federal agency on claims which are cognizable under Part 3 of this title, and the remedies provided by this title in such cases shall be exclusive.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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No. 9

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BERNICE B. FERES, AS EXECUTRIX UNDER THE LAST WILL  
AND TESTAMENT OF RUDOLPH J. FERES, DECEASED,  
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

**REPLY BRIEF FOR PETITIONER**

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The Government in its brief here has cross-referenced petitioner to its brief in *United States v. Griggs*, No. 31, this term, which will be argued after argument in this case, and *Jefferson v. United States*, No. 29, all raising questions in common.

The Government also undertakes to deal with certain special contentions advanced by the petitioner here.

We shall reply insofar as may be relevant.

## I

There is no clear implication in the *Brooks* case that deaths "incident to service" are not included in "claims" under Federal Tort Claims Act.

We adopt and refer to respondent's argument in *United States v. Griggs*, pp. 13-16, inclusive.

## II

Applying the Act as written will not subject the soldier-government relationship to the varying laws of the different States nor result in judicial intrusion into military affairs.

The Act Sec. 421(a) specifically provides that it [the Act] shall not apply to "any claim" . . . "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused."

Subdivision (h) excludes "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights."

## III

The provisions of the Military Claims Act which were supplanted (in part) by the Federal Tort Claims Act do not confirm the view as the Government claims (pp. 29-32 *Griggs* brief) that Congress intended to exclude such claims from the latter Act.

This Court's opinion in the *Brooks* case raises the question as to whether the *Military Claims Act* (57 Stat. 372; 31 USCA 223(b)) indicates a congressional intent to deny the general waiver of sovereign immunity to claims of military personnel because it excludes claims of military personnel for injuries or death occurring "incident to their

service". The *Military Claims Act* contains the following provision:

"The provisions of this Act shall not be applicable to claims for personal injury or death to military personnel or civilian employees of the Department of the Army or of the Army if such injury or death occurs incident to their service."

This Act, briefly summarized, authorizes the administrative settlement not in excess of \$1000.00 of property damage and personal injury claims caused by noncombatant activities of the Army. Liability may exist *irrespective of fault* of army civilian or military personnel but negligence of the claimant bars recovery and the amount allowable for personal injury or death is *limited* to reasonable medical, hospital and burial expenses actually incurred. Personal injury and death claims of military personnel arising "incident to their service" are excluded presumably because adequate provision is made for the hospitalization, medical care and death of military personnel by the statutes referred to in the second Fourth Circuit *Brooks* decision (see *U. S. v. Brooks*, 176 F. 2d 482). Insofar as the Act is concerned with claims cognizable under the Tort Claims Act, it has been repealed by section 424(b) of the original Tort Claims Act (28 USCA 946), though there is a saving clause as to any claim which is not caused by the *negligence* of government employees.

The Military Claims Act does not cover *property damage* claims of military personnel occurring "incident to their service" presumably because provision for such claims are made in the Military Personnel Claims Act of 1945 (Act 29 May 1945; 59 Stat. 225) as amended (31 USCA 223(c)). Under this Act claims of military personnel for damage to or loss of personal property may be settled administratively when such property is used "incident to their service" un-



der conditions prescribed by the Secretary of the Army and "fault" of government employees is not a condition of recovery.

Nor does the Military Claims Act apply to claims arising in foreign countries. They too are treated separately. See Foreign Claims Act; Act 2, Jan. 1942; 55 Stat. 880; 31 USCA 224(d); as amended by the Act of 22 April, 1943, 57 Stat. 66.

The phrase "incident to their service" is not defined in the Military Claims Act or in the Military Personnel Claims Act. However, the Judge Advocate General of the Army has said that the phrase refers to "damages, loss or destruction of property being used by the claimant in the actual performance of some official duty at the time the damage, loss or destruction occurs \* \* \*". See Claims By and Against the Government, Judge Advocate General's School Text No. 8, p. 39 (1944).

From this brief resume, it appears: (1) that Government liability for personal *property* damage claims of military personnel occurring incident to their service is based, not on culpability of Government employees acting within the scope of their employment, but on the type of activity in which the lost or damaged property is used, irrespective of fault; (2) that such claims are covered by the Military Personnel Claims Act and therefore were properly excluded from the Military Claims Act; (3) that personal *injury and death* claims of military personnel arising "incident to their service" were excluded from the Military Claims Act presumably because provision therefor has been made in other Federal statutes; (4) that since claims "incident to their service" are not based on "fault" of Government employees they have no place in the Tort Claims Act and the phrase should not be used to characterize claims of mili-



tary personnel which are predicated upon *negligence* of other service employees.

#### IV

The so-called administrative construction of the Act by the Army Department has little or no weight because:

- (a) contrary to law.
- (b) correctness has been challenged since inception.
- (c) are not of such long standing as to require acceptance by the Courts.

#### V

The American Common Law did not refuse to recognize the right of a soldier to maintain an action against another soldier for acts arising while on duty.

In 36 *American Jurisprudence*, par. 119, p. 267.

“For Injuries to Subordinates or Other Members of Service.—As a general rule a military officer is not liable to a subordinate for acts in the furtherance of discipline so long as he acts within the scope of his duty and is not actuated by personal malice. An officer will, however, be liable to the soldiers under him for acting in an illegal and unauthorized manner toward them. Actions of trespass for injuries to the person have been frequently brought and sustained in the common-law courts against naval as well as military commanders, by their subordinates, for acts done both at home and abroad, under pretense and color of naval and military discipline. There are also cases where actions have been sustained against members of courts-martial, naval and military, who have exceeded their authority in the infliction of punishment. Likewise, an officer of militia issuing and executing a void warrant against a soldier of his company for a fine imposed on him, for neglecting to perform military duty, has been held liable in trespass for the arrest under it.”

• 6 *Corpus Juris Secundum*, p. 419.

"A person in the military service has his civil remedies for any abuse of authority by his military superiors. Thus, actions have been brought by persons in the military service against their superiors, and persons acting under their direction, for various causes.<sup>93</sup> An officer is not answerable for an injury done within the scope of his authority, unless influenced by malice, corruption, or cruelty, although he may have committed an error or judgment in the exercise of his discretionary authority. The burden of proof is on plaintiff to show that the officer exceeded his authority."

The cases relied upon by the Government are not representative of the American Law and not based on claims for negligence.

In New York members of the State Militia are expressly relieved from civil liability and suit pursuant to a special statute (Section 15 Military Law, now Section 26).

This statute explains the decision of *Goldstein v. New York*, 281 N. Y. 396, relied upon by the Government. Furthermore that case cannot be controlling because unlike the Federal Tort Claims Act, the statute construed there contained no definition of an "employee" of the State broad enough to include military personnel. (Cf. Section 402, subd. (6) of Federal Tort Claims Act.) Nor was the New York Court of Claims Act, Laws 1920, Chapter 1922, a general sweeping waiver of immunity mentioning the Armed Forces as in the Federal Tort Claims Act.

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<sup>93</sup> "Assault—An action may be maintained against an officer of the navy for illegally assaulting and imprisoning one of his subordinates, although the act was done upon the high seas, and under color of naval discipline. *Wilson v. Mackenzie*, 7 Hill (N.Y.) 95, 42 Am. D. 51.

Seizure of Property—An officer, authorized to arrest deserters, who takes property belonging to the deserters arrested must respond to the latter in an appropriate action. *Clark v. Cumins*, 47 Ill. 362."

Finally, the position assumed by the petitioner in the court below was fundamentally that the Act authorized a cause of action under the facts gleaned from the complaint; the use of the phrase "incident to service" by counsel below was not the use of a well defined phrase and the language unfortunate and should not be fatal in view of present fuller consideration of the real issues present.

Respectfully submitted,

DAVID H. MOSES,  
*Of Counsel for Petitioners,*  
*Suffern, New York.*

October 12th, 1950.

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**In the Supreme Court of the United States**

OCTOBER TERM, ~~1949~~ 9

BERNICE B. FERES, AS EXECUTRIX UNDER THE LAST  
WILL AND TESTAMENT OF RUDOLPH J. FERES,  
DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

**MEMORANDUM FOR THE UNITED STATES**

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1949

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No. 558

**BERNICE B. FERES, AS EXECUTRIX UNDER THE LAST  
WILL AND TESTAMENT OF RUDOLPH J. FERES,  
DECEASED, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

## **MEMORANDUM FOR THE UNITED STATES**

The court below has held that recovery may not be had under the Federal Tort Claims Act for the death of a member of the armed services whose death resulted from an injury incident to his service. In *Brooks v. United States*, 337 U. S. 49, this Court held that damages for injury to or death of a serviceman was recoverable under the Federal Tort Claims Act where that injury did not arise as an incident to the service; while it stated that where the injury or the death was service caused or connected "a wholly different case would be presented" it left that question open. The question of whether recovery can be had under the Federal Tort Claims Act for the



injury or death of a member of the armed services where the injury or death was incident to the services has given rise to divergent views in the lower Federal courts. In addition to the instant case, the same question has been answered in the negative by the court below in *Ostrander v. United States*, 178 F. 2d — (in which we are advised that a petition for a writ of certiorari will be filed), and by the Court of Appeals for the Fourth Circuit in *Jefferson v. United States*, 178 F. 2d 518 (in which a petition for a writ of certiorari has been filed, No. 381, Misc., this Term). The question has been decided in precisely the opposite manner by the Court of Appeals for the Tenth Circuit in *Griggs, Executrix, v. United States*, 178 F. 2d 1, in which case we propose to seek review. From these cases and many others which are pending in various United States district courts, it is apparent that the question is one of considerable importance.

While we regard the decision of the court below as correct, we believe that the conflict among the circuits and the importance of the question call for an authoritative decision by this Court. Consequently we do not oppose the granting of the petition.<sup>1</sup>

Respectfully submitted.

PHILIP B. PERLMAN,  
Solicitor General.

MARCH 1950.

<sup>1</sup> Nor, as stated in a separate memorandum being submitted simultaneously herewith, do we oppose the granting of the petition in the *Jefferson* case, No. 381, Misc., this Term.



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No. 9

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**In the Supreme Court of the United States**

OCTOBER TERM, 1950

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**EMERSON B. FERRE, AS EXECUTOR UNDER THE LAST  
WILL AND TESTAMENT OF RUDOLPH J. FERRE, DE-  
CEASED, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

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**BRIEF FOR THE UNITED STATES**

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**In the Supreme Court of the United States**

OCTOBER TERM, 1950

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No. 9

BERNICE B. FERES, AS EXECUTRIX UNDER THE LAST  
WILL AND TESTAMENT OF RUDOLPH J. FERES, DE-  
CEASED, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

---

BRIEF FOR THE UNITED STATES

---

OPINIONS BELOW

The opinion of the district court (R. 2-3) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (R. 8-12) is reported at 177 F. 2d 535.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1949 (R. 12). The petition for a writ of certiorari was filed on January 26, 1950 and

granted on March 13 (R. 13). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether damages may be recovered under the Federal Tort Claims Act by the dependents of a member of the armed forces for his death which was incident to his military service, and occurred as a result of the alleged negligence of other military personnel.

#### STATUTE INVOLVED

Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code [formerly the provisions of the Federal Tort Claims Act], are set forth in the Appendix to the Brief for the United States in *United States v. Griggs*, No. 31, this Term.

#### STATEMENT

Petitioner's claim for damages under the Federal Tort Claims Act is based on the allegedly wrongful death of her husband. Her complaint alleged that on December 10, 1947, her husband, an Army lieutenant, "while on active duty in service of the United States, was killed by fire in a barracks in Pine Camp, New York, a military post or station of the United States, to which barracks [he] had been assigned and required to be quartered in by his superior officers" (R. 4).

The complaint alleged negligence on the part of those superior officers who required the deceased officer to be quartered in barracks which they knew or should have known "was unsafe due to a defec-

tive heating plant" (R. 4). Further negligence was also alleged on the part of the fireguard, assigned to the area in which the fire occurred, and on the part of the fireguard's supervisors (R. 4).

The district court sustained the motion of the United States to dismiss the complaint, ruling that the Federal Tort Claims Act does not authorize a recovery for damages for the death of an Army officer who was killed incident to his service as a result of the negligence of other Army personnel (R. 2-3). The Court of Appeals for the Second Circuit affirmed (R. 8-12).

#### ARGUMENT

This case, in common with *United States v. Griggs* and *Jefferson v. United States* (Nos. 31 and 29, this Term), raises the question as to whether Congress intended the Federal Tort Claims Act to cover claims for the death or injury of a soldier, sustained incident to his military service and as a result of the negligence of other military personnel. The brief for the United States in the *Griggs* case, No. 31, develops the reasons and authorities which we submit establish the correctness of the decision below in the instant case. Accordingly, we are undertaking here only to deal briefly with certain special contentions advanced by the petitioner.

1. Petitioner's argument that the death in the instant case was not incident to Lt. Ferres' military service is without merit. First, it must be noted that this argument is a complete reversal of the po-

sition taken by petitioner in the court below. There, petitioner, in acknowledging the service-incident nature of her husband's death, stated the question on appeal to be whether "a soldier or his estate can sue the United States under the Tort Claims Act for a tort committed upon him by an agent of the United States, which tort was incident to his service."<sup>1</sup> Second, the facts alleged by petitioner in her complaint confirm the fact that Lt. Feres' death was incident to his military service. That complaint shows that he was in the military barracks where he burned to death only because, as petitioner herself emphasized, his superior officers "assigned and required [him] to be quartered" there (R. 4). Since his military obligations compelled him to maintain his quarters in those barracks, there can be no doubt that the instant claim for damages based on alleged negligence on the part of the superior officers in requiring him to be quartered there is a claim arising out of a service-incident death.

2. Petitioner, while recognizing the need for prohibiting *injured* soldiers from suing "as a matter of discipline",<sup>2</sup> contends, however, that a different rule should apply to dependents of soldiers who have been killed in service. But it is obvious that the identical considerations of impairment of military

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<sup>1</sup> Brief filed by petitioner in the court below (No. 61, Court of Appeals for the Second Circuit), at page 2.

<sup>2</sup> Petition for Writ of Certiorari, p. 20.



discipline as a result of judicial review of military action, with the consequent shift to civilian courts of the military's traditional right of self-regulation, apply with equal force to death, as well as to injury, situations. See brief for the United States in the *Griggs* case, pp. 21-28. Moreover, the need for applying the same rule to both types of cases is manifested by *Dobson v. United States*, 27 F. 2d 807 (C.A. 2), certiorari denied, 278 U. S. 653, and *Bradey v. United States*, 151 F. 2d 742 (C.A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880—both of which, like the instant case, were death cases. Accord: *Goldstein v. New York*, 281 N.Y. 396, where the dependents of a serviceman, who was killed in the line of duty as a result of the negligence of another serviceman, were also denied recovery.<sup>3</sup>

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<sup>3</sup> *Green v. New York*, 278 N.Y. 15 and *Bamman v. Erickson*, 259 App. Div. 1040, relied on in the Petition for Writ of Certiorari, p. 21, have no application here. Those cases are concerned with a New York statutory suspension of a convict's civil rights during his term of sentence. The *Green* case merely applied this statute in prohibiting an inmate from suing the State on a negligence claim. And, in the *Bamman* case, the statute was held not to preclude a convict from assigning to his victims the right to recover a wager deposit, in circumstances where the convict retained no beneficial interest in the cause of action.

## CONCLUSION

For the reasons set forth above and in the Brief for the United States in the *Griggs* case, No. 31, it is respectfully submitted that the judgment of the court below should be affirmed.

PHILIP B. PERLMAN,  
*Solicitor General.*

H. G. MORISON,  
*Assistant Attorney General.*

NEWELL A. CLAPP,  
*Special Assistant to the Attorney General.*

PAUL A. SWEENEY,  
MORTON HOLLANDER,  
*Attorneys.*

SEPTEMBER 1950

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**Supreme Court of the United States**

OCTOBER TERM, ~~1949~~ 1950

No. ~~100~~ 29

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ARTHUR K. JEFFERSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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PETITION FOR CERTIORARI FILED FEBRUARY 18, 1950.

CERTIORARI GRANTED MARCH 13, 1950.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 667

ARTHUR K. JEFFERSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF MARYLAND**

Civil Action No. 3692

ARTHUR K. JEFFERSON, Joppa, Maryland, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

COMPLAINT IN TORT—Filed July 31, 1947

1. Plaintiff is a citizen of the United States residing in the First Election District of Harford County, in the State of Maryland. This action is brought under Section 410, Title IV, Chapter 753 of the Act of August 2, 1946, 60 Stat. 843, 28 U.S.C. Section 931 and is a tort claim for damages which has never been presented to any Federal agency for administrative adjustment under the provisions of Section 403 of said Act (28 U.S.C. Sec. 921).

2. Plaintiff, on or about July 3, 1945, while on active duty as a member of the Army of the United States, was caused to undergo an abdominal operation at Fort Belvoir Hospital, Fort Belvoir, Virginia, performed by a surgeon of the United States Army Medical Corps on active duty, whose name is unknown to plaintiff and who alone and/or with other employees of the Government failed to use due and proper care and skill in attending plaintiff in that a hand towel marked "U S Medical Department" was carelessly and negligently left in plaintiff's abdomen.

3. Plaintiff was honorably discharged from the Army on or about January 9, 1946.

[fol. 3] 4. As a direct result of the presence of said hand towel in the abdomen of plaintiff, the presence of which was unknown to plaintiff, plaintiff suffered intense pain, jaundice and nausea and as a direct result of the presence of the aforesaid towel in his abdomen was caused to undergo another abdominal operation, during which the said hand towel was discovered and removed from his stomach.



The presence of said hand towel had so distorted and injured plaintiff's small intestines that a part thereof had to be removed. Further operative procedure also became necessary to permit drainage of the abdominal wound. The plaintiff was and still is unable to eat and digest food normally in normal amounts and will have to undergo further treatment for the injuries complained of and suffered by him as aforesaid.

5. Plaintiff says that the said injuries were directly caused by the negligence of the aforesaid surgeon of the United States Army Medical Corps, and/or the negligence of other employees of the Government who assisted him in the said operation while the said surgeon and the said other employees of the Government were acting within the scope of their employment for the Government without any negligence on the part of plaintiff contributing thereto.

6. As the result of said injuries, plaintiff has suffered and will continue to suffer physical pain and mental anguish and has incurred and will incur expenses for medical attention and treatment, and has lost and will permanently lose large sums from his earnings by reason of his aforesaid injuries, which are incurable and permanent.

Wherefore plaintiff demands judgment against the defendant [fol. 4] in the sum of One hundred thousand dollars (\$100,000.) and costs.

Tydings, Sauerwein, Archer, Benson & Boyd, By Morris Rosenberg, a Member of the firm, and Robert H. Archer, Jr., Attorneys for Arthur K. Jefferson, Office and Post Office address: 401 Davison Building, Charles and Fayette Streets, Baltimore 1, Maryland.

[fol. 5] SECOND AMENDED ANSWER—Filed 1st April, 1948

IN UNITED STATES DISTRICT COURT

[Title omitted]

SECOND AMENDED ANSWER—Filed April 1, 1948

The United States of America, defendant in the above-entitled case, by Bernard J. Flynn, United States Attorney,

and James B. Murphy, Assistant United States Attorney, in and for the District of Maryland, upon written consent of the plaintiff being first had in accordance with Rule 15 (a) of the Federal Rules of Civil Procedure, files this amended answer to the plaintiff's bill of complaint.

#### First Defense

The Complaint fails to state a claim against the defendant upon which relief can be granted.

#### Second Defense

The Federal Tort Claims Act (Public Law 601, 79th Congress—ss. 921-946, Title 28 USCA) does not authorize suit against the United States of America by an officer or enlisted man of the United States Army or Navy or other military forces of the United States of America, or by a former member of the Armed Forces of the United States of America, for an injury caused by another member of the Armed Forces received by such person while a member of the Armed Forces.

#### Third Defense

The suit is barred by reason of the plaintiff having been awarded and accepted disability benefits under the provisions of Chapters 10, 11 and 12, Title 38 of the United States Code, and Veterans' Regulations 1 (a) promulgated pursuant to Chapter 12, Title 38, United States Code, which regulation is recorded immediately following Section 735 of Title 38, Supp. V.

#### Fourth Defense

The suit is barred by the Statute of Limitations of Virginia (Section 5818, Virginia Code of 1942), the law applicable to this case, for the reason that the cause of action complained of accrued more than one year prior to institution of this suit.

#### Fifth Defense

Defendant admits the allegations contained in paragraphs 1 and 3 of the Complaint; alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4 and 6 of the Com-

plaint; and denies each and every other allegation contained in paragraphs 3 and 5 of the Complaint.

### Sixth Defense

The employee of the defendant whose alleged negligence caused the injuries complained of and the plaintiff were on the date of the alleged negligent act "fellow-servants" of the defendant.

Bernard J. Flynn, United States Attorney; James B. Murphy, Assistant United States Attorney, Attorneys for Defendant.

I hereby consent to the filing of this Amended Answer.  
Morris Rosenberg, Attorney for Plaintiff.

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[fol. 7] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF MARYLAND

Civil Action No. 3692

ARTHUR K. JEFFERSON

v.

UNITED STATES OF AMERICA

OPINION—Filed October 23, 1947

CHESNUT, District Judge:

This case presents another new, difficult and unprecedented question arising under the Federal Tort Claims Act. The question is whether the Act authorizes a suit by a former member of the Military Forces to recover damages allegedly caused by a negligent abdominal operation performed on the soldier on or about July 3, 1945, by an Army surgeon in the State of Virginia (the plaintiff being a citizen of Maryland), while both were on active duty. The United States has moved to dismiss the complaint on the ground that such a suit is not within the coverage of the Act.

The argument in support of the motion advances the contentions that the Act properly construed was not intended by Congress to authorize suits by members of the Military

Forces of the United States due to injuries sustained by the negligence of another member of the Forces, while on active duty, because compensation for such damages has otherwise been provided by the United States for the benefit of [fol. 8] veterans by an elaborate system of disability and pension allowances which have been long in force (38 USCA, ss. 151-205, and 38 USCA, c. 12, and Veterans' Regulations pursuant thereto). Support for this contention is based largely upon the cases of *Dobson v. United States*, 2d Cir. 27 F. 2d 807, cert. den. 278 U. S. 653; *O'Neal v. United States*, 11 F. 2d 869; (D. C. N. Y.), affd. 11 F. 2d 871; and *Bradey v. United States*, 2d Cir. 151 F. 2d 742, where, in suits brought against the United States under the Public Vessels Act (46 USCA, ss. 781-790) it was held the general language of the Act allowing "A libel in personam in admiralty may be brought against the United States \* \* \* for damages caused by a public vessel of the United States", is not sufficient to impose liability on the United States in a suit brought by a seaman on a public vessel for alleged injuries due to the negligence of other members of the crew. It is further argued that there is a special relationship between the United States and members of its Armed Forces, the nature of which makes it unreasonable to think that Congress intended to extend the benefits of the Act to such a situation as is here set up in the complaint because, it is further said, the status of a member of the Armed Forces with relation to the government is not the normal master-servant or employer-employee status wherein the doctrine of "respondeat superior" is applicable. It is also pointed out that the special nature and some of the incidents of this special relationship have recently been set forth by the Supreme Court in *United States v. Standard Oil Co.* [fol. 9] 331 U. S. —. And in this latter connection it may possibly be further suggested that such a suit could not have been fairly within the contemplation of Congress because the general statutes, duties and incidents of military service are necessarily matters of federal law, whereas the liability imposed upon the United States by the Act is only—

"on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United

States, if a private person, would be liable to the claimant for such damage, loss, injury, or death *in accordance with the law of the place where the act or omission occurred.*" (Italics supplied)

While this argument has plausibility and force, I have so far not been able to reach the conclusion that it is convincing in view of the scope of the wording (both affirmative and negative) of the Act itself. The most relevant provisions in the Act are these. Section 402 (b) of the Act provides—

" 'Employee of the Government' includes . . . members of the military or naval forces of the United States"

and section 402 (c) provides—

" 'Acting within the scope of his office or employment' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Section 410 (a) is the principal affirmative imposition of liability and conferring of jurisdiction on the district courts. The liability imposed is for money only on account of damages caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable, in accordance with the law of the place where the act or omission occurred.

Section 421 sets up 12 separate and distinct classes of cases as exceptions to the general liability imposed by section 410. Here the only possibly relevant exception is section 421 (j) reading

"Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

but it is obvious that this exception is not applicable in the present case (*Skeels v. United States*, 72 F. Supp. 372, D. C. La.) In construing and applying the statutory lan-



guage we therefore have an affirmative section which literally is sufficiently broad to cover the instant case; and, while there are numerous excepted situations, none of the latter are applicable, with the seeming result that the literal wording of the affirmative provision for liability should not be whittled down by construction unless there is some very controlling reason therefor.

Although the Federal Tort Claims Act, approved August 2, 1946, was the culmination of a long congressional history of consideration of similar or related Acts, counsel have not been able to refer me to any particular legislative history of the Act or its antecedents in subject matter which throws any floodlight upon the question now presented. But possibly there may be some significance in the fact that many of the prior bills upon the subject did affirmatively include in the mentioned exceptions from coverage of the law, claims [fol. 11] for which compensation was provided by the Federal Employees Compensation Act (5 USCA, s. 751, et seq.) or by the World War Veterans' Act of 1924, as amended (38 USCA, ss. 421-576).<sup>1</sup> As we have seen, the present Act

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<sup>1</sup> For instance, see Congressional Record, Vol. 86, Part 11, 76th Cong. 3d Sess. 1940, pp. 12015-12032, where the House was debating HR 7236, the major provisions of which were quite similar to the present Tort Act. See particularly the 12 exceptions contained in section 303 of this particular Bill, p. 12030. It will be noted that the Bill then under discussion in this section 303 contained 12 excepted classes of liabilities, the majority of which are the same as those in the Tort Claims Act. But it is important to note two exceptions. Thus, subparagraph 8 of section 303 of H. R. 7236, contained the following exception which is *not* in the present Act;

“8. Any claim for which compensation is provided by the Federal Employees Compensation Act, or by the World War Veterans' Act of 1924, as amended.”

And the indications from the discussion of the provisions of HR 7236 seem to be to the effect that, if that exception had not been contained in that Bill, the result would have been that military personnel could have sued under the Act

is silent in this respect and it has been said that "prints of the bill, S. 2177, in the various stages of its enactment, the committee reports and the hearings, fail to mention these statutes or give any reason for their non-inclusion. Under such circumstances, a presumption arises that where a claim [fol. 12] is cognizable under the present law, which is not barred by the two mentioned statutes relating to federal employees or to world war veterans such claim may under the election of remedies theory, be prosecuted hereunder." See article entitled "Federal Tort Claims Act—A statutory interpretation" by Gottlieb, 35 Georgetown Law Journal, 1, 57. I have not been able to find in the World War Veterans' Act above referred to any specific provision with respect to the effect of the acceptance of the benefits provided thereby;

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unless the claim also fell under subparagraph 11 of the same proposed Act which read—

"Any claim arising out of the activities of the military or naval forces, or the Coast Guard, during time of war."

It may also be important to note that there is possibly a very important difference between the wording of the exception (11) just quoted as contained in the former proposed Act, and the wording of the related exception (j) in the present Act. The latter reads—

"Any claim arising out of *combatant* activities of the military or naval forces, or the Coast Guard, during time of war." (Italics supplied)

Apparently the word "combatant" was inserted in the present Act during the debate in the House by an amendment offered by Mr. Monroney in charge of the Bill in the House. The effect of the insertion of the word "combatant" obviously further restricts the exception; but apparently there was no explanation or discussion of the matter. See Gottlieb, 35 Georgetown Law Journal, p. 50.

The complaint in the instant case alleges that the negligent surgical operation occurred at Ft. Belvoir, Virginia, July 3, 1945, which, of course, was during the time of war at least with Japan; but it seems clear enough that the plaintiff's claim cannot be said to have arisen out of *combatant* activities during time of war.

nor have I found any judicial decision that acceptance of [fol. 13] benefits under that Act precludes resort to other possibly available legal remedies; (but see *Commers v. United States*, 66 F. Supp. 943) although it has, of course, been decided with respect to the Federal Employees Compensation Act (covering civilian as distinct from military personnel) that acceptance of benefits under that Act precludes suits under other federal Acts, under the doctrine of election of remedies. *Brady v. Roosevelt S. S. Co.* 317 U. S. 575, 577, 581; *Reh. den.* 318 U. S. 799; *Dahn v. Davis*, 258 U. S. 421; *Militano v. United States*, 55 F. Supp. 904 (N. Y.); *United States v. Marine*, 4th Cir. 155 F. 2d 456, affirming 65 F. Supp. 111 (D. C. Md.).

I am not satisfied that the reasoning of the *Dobson* case (*supra*) and its successors should be applied here. The language of the Public Vessels Act which was there involved was very general indeed (but see *Canadian Aviator, Ltd., v. United States*, 324 U. D. 215, 226). That Act provided that the United States could be sued "for damages caused by a public vessel of the United States." It did not expressly provide what classes of persons could or could not bring such suits; but did limit liability to damages caused by the vessel. It was an entirely reasonable construction of that general language to hold that it was not the intention of Congress to impose liability for personal damage to members of the ship's company arising on the ship but not caused by the ship itself as a juridical entity; in view of the long established policy of the United States [fol. 14] embraced in statutes providing benefits for navy personnel.

By contrast the affirmative provision of section 410 (a) of the Tort Claims Act is much more explicit. The section affirmatively confers jurisdiction on the district courts to—

"render judgment on *any* claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office of employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury,

or death in accordance with the law of the place where the act or omission occurred. Subject to provision of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees." (Italics supplied)

(Amended August 1, 1947 with respect to allowance of compensatory damages in lieu of punitive damages in certain cases. Public law 324, 80th Cong. ch. 446, 1st Sess.).

The wording of the Tort Claims Act is more analogous to the Suits in Admiralty Act than to the Public Vessels Act. Title 46 USCA, s. 742 (Suits in Admiralty Act) provides—

"In cases where if such vessel were privately owned or operated \* \* \* a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States \* \* \* provided that such vessel is employed as a merchant vessel \* \* \*"

[fol. 15] And therefore cases under the Suits in Admiralty Act would seem to be more persuasive in their applicability here than cases decided under the Public Vessels Act. In *United States v. Marine*, 4th Cir. 155 F. 2d. 456 (Affirming 65 F. Supp. 111, D. C. Md.) it was held that a United States Custom Inspector injured in the discharge of his duties in consequence of a defective landing ladder from a ship owned by the United States, was entitled to recover damages in a suit against the United States under the Suits in Admiralty Act, and that his exclusive remedy was not, as contended for by the government, under the Federal Employees Compensation Act. Members of the ship's company, for instance seamen employed by the United States, may and often do successfully sue under the Suits in Admiralty Act. See also for some-

what analogous cases, *Dahn v. Davis*, 258 U. S. 421; *Payne v. Cohlmeier*, 7th Cir. 275 F. 803.

[fol. 16] But aside from the difference in wording between the Public Vessels Act and the suits in Admiralty Act and the Tort Claims Act, it is to be importantly borne in mind that the last mentioned Act represents a marked departure by the United States with respect to the waiving of sovereign immunity. It is a comprehensive Act which, subject to the exceptions therein contained, acknowledges liability of the sovereign for injuries and damages to property and persons generally where the damage results from negligence in the performance of duties by its employees. This comprehensive Act was passed subsequent to the various special Acts waiving immunity under certain conditions and to a limited extent, as in the Public Vessels Act and the Suits in Admiralty Act. By one of the exceptions it does not apply to claims or suits in admiralty against the United States under the Suits in Admiralty Act (46 USCA, ss. 741-752 inclusive) or the Public Vessels Act (46 USCA, ss. 781-790 inclusive). But outside of the specific exceptions, as already noted, it does apply to "any claim against the United States, for money only accruing on and after January 1, 1945." It is also made expressly clear that it does apply (subject to exceptions) to damages occasioned by negligent action of members of the military or naval forces of the United States acting in the line of duty. It therefore clearly covers claims against the government by virtue of negligent acts of military personnel damaging private citizens and even civilian federal employees who have not accepted benefits under the Federal Employees Compensation Act.

The only open question here seems to be whether the comprehensive authority "to adjudicate any claim" should be narrowed by construction to exclude a claim *by* military personnel arising from the negligent action of other military personnel while both were on active governmental service, [fol. 17] by reason of the special relationship existing between the government and its Military Forces, and particularly in view of the administrative disability benefits provided for disabled veterans under long established congressional legislation.

The Assistant United States Attorney contends that the inclusive phrase "any claim" must be so narrowed by construction. In support of his position he particularly relies



upon *Goldstein v. New York*, 281 N.Y. 396 (1939). That case held that a soldier of the New York State Militia was not an employee of the State within the meaning of its Workman's Compensation Law, and also that the State was not liable to the Administrator of the soldier killed by the alleged negligence of fellow soldiers on active duty because the latter were not officers and employees of the State within the meaning of the Court of Claims Act which waived the State's immunity from liability for the tortious acts of its officers and employees. The decision in that case, on the basis on which it was put, is distinguishable from the present case because the Tort Claims Act does expressly provide in sections 402(b) and (c) that employees of the government include military and naval personnel of the United States acting in the line of duty. But it may be said that the philosophy of the opinion in the case is broader than the actual decision. Thus, in the discussion (page 403) it was said:

"The statement that the State may be made liable in damages to a soldier or his dependents, because of injuries inflicted upon him through the negligence of a brother soldier or officer, except as provided in the Military Law, is rather startling. We think that the general understanding has always been that for injuries suffered by a soldier in active service the government makes provision by way of a pension. That this [fol. 18] State has done in the Military Law (ss. 220-224), wherein it is provided when an allowance may be made, for what it may be made, the procedure to be followed and the amount that may be allowed. In fact a complete system is set up for handling such claims.

"To justify a decision that another concurrent remedy has been created whereby the State may be made liable in unlimited amounts requires a statute to that effect, the meaning and intent of which is unmistakable."

And in holding that military personnel in the State Militia were not officers or employees of the State, it was further said (page 405):

"Any other construction would be contrary to the history of military organization and control. \* \* \* True it is that if the word 'officers' is given its broad



meaning it would include every officer engaged in performing a duty placed upon him by law, including the Governor, judges, members of the Legislature and all others occupying an official position in the State. Such an interpretation of the statute would lead to an absurd conclusion. The history of the development of our form of government demands that officials in performing certain functions of government cannot by their official acts create a liability against the State by their negligent performance. The language used in former section 12-a must be given reasonable construction, consistent with our conception of governmental function and public policy.

"It is urged that as the State, by former section 12-a 'consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the supreme court against an individual or a corporation', it, therefore, follows that the State waives its immunity from liability in all cases for the tortious acts of its officers and makes itself liable if an individual or a corporation would be liable on the same facts. The argument overlooks the fact that under all military law the Army constitutes a class separate and apart from the civil officers of the State. In this State, it is governed by the Military Law embodied in the statute which provides in detail for the adjustment of claims like the one here in question."

Something of the same philosophy was many years ago seemingly expressed by the High Court of Australia in [fol. 19] *Enever v. The King*, 3 Commonwealth Law Reports of Australia, p. 969 (1906). In that case the court dealt with the Tasmania Crown Redress Act of 1891 which gave a right of action to persons with just claims against the government "in respect of \* \* \* any act or omission, neglect or default of any officer, agent or servant of the Government of Tasmania which would be the ground of an action at law or suit in equity between subject and subject." It was held by the court that suit would not lie at the instance of a person wrongfully arrested by a constable as the latter was not to be properly considered as an "agent or servant" of the appointing power because the exercise of his authority was original with his official position and not delegated, and he therefore acts on his

own responsibility, and furthermore, as expressed in the headnote on page 970, as the Redress Act allowed suits only which might have been brought "between subject and subject" it was not to be construed as intending to create a responsibility on the government for the acts of its peace officers whom it had appointed, that not being a liability which had ever existed against any subject exercising similar powers.

It is arguable that this judicial approach is relevant and ponderable here. In creating an Army the federal government is, of course, exercising a fundamentally important constitutional power expressly conferred, and members of the Military Forces have from time immemorial had a special relationship to the government which, of course, had (at least prior to the present Tort Claims Act) no liability to suits for injuries or disabilities incurred by the soldier in the military service, [*Commers v. United States*, 66 F. Supp. 943 (D.C. Mont.)] other than the purely administrative remedies provided in voluntary legislation regarding pensions and disability compensation allowances presently contained in the so-called World War Veterans' Act (*supra*).

[fol. 20] Possibly it may also be argued that to sustain the cause of action set up in this case really creates a heretofore non-existent tort, not within the intention of Congress, in view of the language of section 410(a) that the government is to be liable only "under circumstances where the United States, if a private person, would be liable to the claimant for such damage \* \* \* in accordance with the law of the place where the act or omission occurred." More concretely, it may perhaps be said that as the Army surgeon was performing an official act in good faith, he was personally not liable and therefore the government would not be liable. And then again, the government is to be liable only "in accordance with the law of the place where the act or omission occurred", which, in this case, was in the State of Virginia. There has been no argument submitted by counsel as to the law of that particular State with respect to the subject matter, and if the laws of the several States are to control with respect to Army surgeons, there may be resultant lack of uniformity in the administration of the Act dependent upon varying laws of the particular States rather than on uniform federal

law applicable to army officers wherever stationed temporarily. In this connection it was said by Mr. Justice Rutledge in his opinion in *United States v. Standard Oil Co.* supra, in considering the question as to whether the United States was subrogated to the civil rights of a soldier injured by a private party—

“Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government’s right to be indemnified in these circumstances, or the lack of such a right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines.”

[fol. 21] But relevant, or indeed important even, as these considerations may be I am not presently convinced that the broad and comprehensive language of the Tort Claims Act should be narrowed by construction to exclude a case not included in the numerous exceptions expressed in the Act itself. The contention to the contrary would seemingly bar any redress to a soldier for the negligent acts of other soldiers under any circumstance (combatant activities of course being specially excepted by the Act). Thus, for instance, a soldier on furlough injured by the negligent action of another soldier on active duty as a result of an automobile collision, would not be entitled to sue under the Tort Claims Act.

In view of the novelty and difficulty of the question presented by the motion to dismiss, I have concluded that it should be overruled at this time without prejudice. Perhaps the proper application of the Act will become clearer on further argument and consideration and the possible narrowing of issues by the developed facts of the particular case.

At the hearing on the motion counsel for both parties agreed on the fact that at the time of the filing of the complaint in this case (July 31, 1947) and at the present time, plaintiff has been in receipt, under the World War Veterans’ Act above mentioned, of a monthly disability allowance of \$138.00, but this fact does not appear in the complaint and is not now in the record by way of defense or otherwise. Counsel for the plaintiff stated as his posi-

tion in regard to this payment that it was in mitigation of damages and did not operate as a bar to the suit. Counsel for the defendant, however, has based his motion to dismiss the complaint not on this specific fact but on the [fol. 22] general construction of the inapplicability of the affirmative provision of the Act to this case. As the particular point is not now in the record and has not been fully argued, I consider it premature to base any decision thereon at this time.

Counsel may present the appropriate order in due course.

W. Calvin Chesnut, U. S. District Judge.

[fol. 23] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF MARYLAND

Civil Action No. 3692

ARTHUR K. JEFFERSON

VS.

UNITED STATES OF AMERICA

OPINION—Filed May 7, 1948

CHESNUT, District Judge:

This is a suit under the recently enacted Federal Court Claims Act, 28 USCA, s. 921, et seq. The plaintiff who had been an aviation mechanic at the Glenn L. Martin Company's plant in Baltimore, enlisted in the United States Army October 22, 1942. On July 3, 1945, while still in the Army he underwent an abdominal operation for gall bladder trouble at Fort Belvoir, Virginia, a Government Hospital. The operation was performed by a United States Army medical officer who was the chief surgeon at the hospital at the time. The complaint in this case is that a large towel, 30 inches long by 18 inches wide, was negligently left in the plaintiff's abdomen during the operation and remained there until it was discovered during a subsequent abdominal operation performed at the Johns Hopkins Hospital in Baltimore on March 13, 1946. He alleges total and permanent disability as a result of this alleged negligence.

The complaint was filed July 31, 1947. The defendant filed a motion to dismiss on the ground that the Federal Tort Claims Act did not cover a case of this kind. After extended hearing on the motion it was overruled *without prejudice*, October 29, 1947. Subsequently the defendant has filed an answer and amended answers and the case has been heard upon testimony and arguments of counsel. The evidence establishes the following briefly summarized facts.

1. When the plaintiff first enlisted in the Army he was 45 years of age. He had previously had an abdominal operation for appendicitis from which he had apparently completely recovered. About five months after enlisting and while in the Army he had an abdominal operation at an Army hospital at Indiantown Gap, Pennsylvania, during which one of his kidneys was removed. After several weeks in the hospital he returned to service and was given somewhat lighter work at various aviation fields as a flight chief. From January 19 to May 17, 1943, he had various medical complaints diagnosed as hydronephrosis and a subsequent diagnosis of herpes of the lower lip reported cured on February 7, 1943; but on February 19, 1943, a further diagnosis indicated pleurisy, reported cured on March 3, 1943. From February to April, 1945, he had an ill defined condition of the gastro intestinal system including vomiting, with non-functioning gall bladder and an absence of the right kidney which had been removed on March 5, 1943. From April 24 to November 20, 1945, he had cholecystitis. The operation on July 3, 1945, made the basis of the complaint in this case, was for cholecystostomy. During the earlier portion of this period he was at Edgewood, Maryland, suffering from jaundice for two or three months until he was sent to Fort Belvoir, Virginia.

2. The plaintiff is a naturalized citizen, a native of Denmark. He was honorably discharged from the Army on January 9, 1946. On March 8, 1946, he went to the Johns Hopkins Hospital in Baltimore for treatment (because of vomiting spells and nausea which had commenced about two weeks prior to admission and grown increasingly more severe). On March 13, 1946, he was operated upon by Dr. Grose who had graduated at Johns Hopkins University



Medical School some years previously, had been an interne there in the surgical department for a year or so; had served for two or three years in the Hopkins Medical Unit in the South Pacific, and had then returned to Hopkins for a while and at the particular time was engaged in private surgical practice.

3. Dr. Grose found a well healed medical scar on the front abdomen of the plaintiff through which he again operated and as a result of the operation found a towel in the lower part of the plaintiff's stomach which had partly worked into the duodenum. This towel was removed, measured and photographed. It bore the legend "Medical Department U. S. Army". It was  $2\frac{1}{2}$  feet long by  $1\frac{1}{2}$  feet wide. Dr. Grose also found the condition and relation of the plaintiff's stomach and intestines to each other was such as to indicate very clearly that there had [fol. 25] been a previous operation on the plaintiff for gastro-jejunostomy which, in Dr. Grose's opinion, meant an opening of the stomach. The doctor expressed the opinion that there were three possibilities as to how the towel could have gotten into the plaintiff's stomach. First (theoretical largely) that it had been swallowed by the plaintiff; second, that it had been left in the plaintiff's abdomen during a surgical operation which must have occurred some months before which, if it did not involve an opening of the stomach and placing of the towel therein, had resulted in the towel working its way through the walls of the stomach into the stomach itself (and then partially back into the duodenum). While this was a possibility by reason of some few prior recorded cases of a similar nature, such a happening would be very rare indeed; third, the remaining possibility was that in a prior operation, as for instance, gastro-jejunostomy, the towel had been placed in the stomach to prevent the flow of matter from the intestines into the stomach and had been inadvertently left in the stomach when the patient's abdominal surgical wound was closed.

4. After the operation by Dr. Grose the plaintiff was subsequently treated at the Marine Hospital in Baltimore, medically and surgically. He was later examined by Dr. Grose and found to have sustained a serious hernia which was attributed by Dr. Grose to the after affects of the operation at Hopkins thought to have been caused by inflammation

or infection as a post-operative result of the removal of the towel.

5. The present physical condition of the plaintiff is that he gets some relief from the effects of the hernia by wearing a corset. He is able to walk about and stand around but cannot well lean forward either standing or sitting in a chair. After three or four hours of any activity, he finds it necessary to rest, preferably by lying down. In Dr. Grose's opinion he is not employable industrially but could do clerical work if otherwise qualified therefor. As the plaintiff is nearly 50 years of age and a mechanic by prior occupation, it is doubtful if he could engage in any gainful employable pursuit.

6. The Army Hospital at Ft. Belvoir, Virginia, is a [fol. 26] regional hospital with a large staff of hospital employees and with numerous patients in different wards. The Chief Surgeon at the hospital at that time, is now in private practice in New York City. He testified as a witness for the government that the operation at Ft. Belvoir upon the plaintiff had been conducted by himself; that he recalled the case of the plaintiff for two reasons, (1) that the plaintiff was an older man than most of the Army patients and, (2) because the plaintiff spoke English imperfectly. He did not recall in precise detail all the incidents of the particular operation but stated definitely that the operation was for cholecystostomy, which involved no opening of the stomach and that in fact he had never performed (the operation of) gastro-jejunostomy while he was in the Army service. He had been in private practice specializing as a surgeon for some ten years or more before entering the Army where he saw service in Africa and Italy before being appointed as Chief Surgeon at Ft. Belvoir. He is a graduate of recognized medical schools and a lecturer on surgery in one of them. He referred to a recorded account of the operation dictated by him to a secretary and signed by him shortly after the operation had been performed on the plaintiff, in accordance with the customary requirements of the Army. This account of the operation showed that it was for cholecystostomy which did not involve gastro jejunostomy requiring an opening of the stomach. He said that the original purpose of the operation was to remove the gall bladder but he found upon examination that it was located in such a way that this was impossible and therefore he substituted

for the removal of the gall bladder the insertion of a drain. The operation including the administration of the anesthetic lasted about four hours, and after the operation the patient was placed in an oxygen tent. He was not sure of the length of the incision that was made. Ordinarily such an operation would require only a three-inch incision. This particular one might possibly have required more. He did not use any towels such as that later found in the plaintiff's stomach although such ordinary hand and face towels were doubtless in the operating room. Such towels and bandages as were [fol. 27] used were attached to metal clips to insure facility of removal after the operation and if one had inadvertently been left in the opening it would have been discovered by an X-ray. His attention was not again called to the particular operation until a few months ago when he received a letter of inquiry from the Army stating that suit had been filed by the plaintiff based on an operation at Ft. Belvoir while he was Chief Surgeon there. The suit was filed July 31, 1947. The government did not call as witnesses any other members of the hospital staff, either assistant surgeons or nurses, some of whom must have been present during the operation. The Assistant United States Attorney stated that he was unable to ascertain who they were so long after the operation.

7. A few days after the plaintiff's honorable discharge from the Army he filed a formal application for service-connected disability benefits with the Veterans' Administration. On March 11, 1946 the plaintiff was allowed 30% disability for the removal of the kidney while in the Army, in the amount of a monthly payment of \$34.50. Later, consequent upon further regular physical examinations, after the removal of the towel from the plaintiff's stomach and his subsequent increased disability, his disability rate was increased on October 16, 1947 so that he now has for some time past been receiving monthly checks for \$138.00 as 100% disability. In all he has received to date as of April 30, \$3,645.50, and on estimated life expectancy of 22 years under existing legislation, will prospectively receive \$31,947 in addition. The original disability allowance of \$34.50 was fixed by statute as the amount payable for the removal of one kidney. The increase in the allowance was in the discretion and judgment of the Veterans' Administration. By stipulation of the parties the life expectancy of the plain-

tiff at his present age, based on ordinary average mortality tables, is 22 years. His earning capacity at the Martin plant had been about \$1.30 an hour with some reasonable expectation of advancement if the plaintiff had been able to return to work in the usual way. The commuted value of this earning capacity for an estimated life expectancy of 22 years would be about \$45,000.

From the evidence as a whole, despite the factual difficulties [fol. 28] ties and uncertainties, I conclude that the facts justify the finding that the towel must have been placed in the plaintiff's abdomen or stomach at the time of the operation at Ft. Belvoir as alleged; and the failure to remove it before closing the surgical wound was negligence on the part of agents or employees of the government at the hospital. There was no evidence of any abdominal operation on the plaintiff other than those mentioned; and it is highly improbable that the towel could have been left in the plaintiff at the time of the kidney operation.

I conclude also that if the plaintiff is entitled to recover at all in this case the actual and prospective payments made to him by the Veterans' Administration must be, as conceded by plaintiff's counsel, treated as diminution of the amount of the verdict; and in view of all the evidence in the case, including the plaintiff's various medical and surgical disabilities preceding the operation at Ft. Belvoir, I would conclude that presently a sum of \$7,500.00 would be an appropriate verdict.

However, I conclude as a matter of law and for the reasons now to be stated, that the Federal Tort Claims Act does not cover this case of the plaintiff because it was a service-connected disability occurring while the plaintiff was an enlisted man in the United States Army and occurring as a result of negligence on the part of employees of the government at the hospital.

### Opinion

This case is an unusual one on the facts, and novel as to the law, and difficult as to both. The question of primary importance is whether the Federal Tort Claims Act (28 USCA, s. 921, et seq.) covers the case, that is, does it apply to a suit by an enlisted soldier in the Army of the United States injured by the alleged negligence of an Army officer as a surgeon who performed the operation on the

plaintiff, or by his assistants in the operation who were employees in the United States Army, the operation having been conducted at Ft. Belvoir, Virginia, on July 3, 1945. This question was first presented to the court on a motion by the United States to dismiss the complaint principally [fol. 29] on the ground that the Act did not cover the case. An extended opinion was filed October 23, 1947, discussing this question and stating the arguments pro and con, toward the end of which it was stated: "In view of the novelty and difficulty of the question presented by the motion to dismiss, I have concluded that it should be overruled at this time without prejudice. Perhaps the proper application of the Act will become clearer on further argument and consideration and the possible narrowing of issues by the developed facts of the particular case."

At the recent trial of the case the same question was more fully and elaborately argued by counsel orally and in briefs submitted to the court and I have given further consideration to the question. As a result of this, I reach the conclusion of law that the Act does not cover this case. In addition to the considerations mentioned in the opinion (*Jefferson vs. United States*, 74 F. S. 209) I have had the benefit of a recent decision of the Circuit Court of Appeals for the Fourth Circuit (*State of Maryland, -use of Burkhardt vs. United States*, 165 F. 2d 869) in another case involving an interpretation of the Act with respect to the applicable period of limitations, and have considered more fully the effect of other federal statutes applicable to the relations of officers and enlisted men of the United States Army to the Government of the United States. The most important of these federal statutes are those relating to the Veterans' Administration under which it now appears from the record in the case that the plaintiff is in receipt of a monthly disability allowance of \$138.00.

The problem of statutory construction now presented is whether the comprehensive phrase "any claim against the United States, for money only" in section 410(a) of the Act (28 USCA, s. 931) without words of limitation as to classes of persons who may make the claim, should be narrowed by construction to exclude claims made by members of the Armed Forces of the United States for service-connected injuries sustained while in such service, in view of the special relationship long existing between the United States



and members of its military forces, and the large body of federal legislation upon the subject. These include elaborate provisions for pay and allowances and retirement [fol. 30] benefits for persons in the United States Army and Navy respectively; and even more importantly for the instant case are the statutes providing benefits for war veterans which stem from the First World War with many amendments now codified in 38 U.S.C.A., and regulations issued thereunder.<sup>1</sup>

It is a familiar rule of statutory construction that the merely literal reading of particular words in an Act can be narrowed by construction where, from the whole subject matter of the particular Act and its setting in the whole governmental scheme, the court can see that the literal import of the phrase used is contrary to established policy and would not accord with the real intention of Congress in passing the Act, and for this purpose we may "look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail" *Takao Ozawa vs. United States*, 260 U. S. 178; *United States vs. Sweet*, 245 U. S. 563; *United States vs. Arizona*, 295 U. S. 174. The problem here is made more difficult by reason of the fact, as noted in the previous opinion in this case, that section 421 of the Act (28 USCA, s. 945) contains numerous types of claims which are excepted from the coverage of the Act, none of which, however, include the instant situation, although in a prior proposed Act for the same general purpose, there was included such an exception. Nevertheless, as previously stated, I reach the conclusion that the implied exception does exist in this case. Some of the considerations which influence this view will now be stated.

It is not unusual in statutory construction to limit a general phrase by other provisions appearing in the Act as a whole. In the present case, the situation is different in that the implied exception comes not from other wording of the Act itself but from long existing other legislation

<sup>1</sup> See also 10 U.S.C.A., ss. 671-920, and 938-1032; 34 U.S.C.A., ss. 381-440, and 865(a)-1001; 37 U.S.C.A. relating to the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey and Public Health Service, and 50 U.S.C.A., war appendix, 1001, et seq.

without cross-reference from one to the other. But there [fol. 31] is a fairly close precedent for the application of the latter in the cases of *Dobson vs. United States*, 2d. Cir. 27 F. 2d. 807, cert. den. 278 U. S. 653, and *O'Neal vs. United States*, 11 F. 2d. 869, affd. 11 F. 2d. 871, and *Bradley vs. United States*, 2d. Cir. 151 F. 2d. 742, where, in suits brought against the United States under the Public Vessels Act (46 USCA, ss. 781 to 790) it was held that the general language in the Act allowing "A libel in personam in admiralty may be brought against the United States \* \* \* for damage caused by a public vessel of the United States," is not sufficient to impose liability on the United States in a suit brought by a seaman on a public vessel for injuries due to alleged negligence of other members of the crew. And in *Burkhardt vs. United States*, 4th Cir. 165 F. 2d. 869, the literal wording of another phrase in section 410(a) of the Act (28 USCA, s. 931) was held not applicable in view of other provisions of the Act with regard to limitations.

It is clear enough that the main purpose of the Act was to waive the then existing sovereign immunity of the United States with respects to the ordinary run of tort claims arising in the United States. (See *Employees Fire Ins. Co. vs. United States*, 9th Cir. April 8, 1948; and *Grace vs. United States*, D. C. Md. 76 F. S. 174). But it is to be noted that the Tort Act was only a part (Title IV) of an even more comprehensive Act entitled the "Legislative Reorganization Act of 1946." As emphasized in the *Burkhardt* case, supra, section 131 of Title I of this Legislative Reorganization Act prohibited institution in Congress of *private bills* for the payment of money for property damages or for personal injuries which might thereafter be made the basis of suits in a district court under the Tort Claims Act. It is well known that in recent years Congress has been quite flooded with private bills of that nature, and it was obviously one of the important purposes of the whole Act to transfer consideration of such claims from an otherwise over-burdened Congress to the federal courts. In this respect the Tort Act (Title IV) was complementary to the provisions of section 131 of Title I of the Legislative Reorganization Act. It is thus fairly inferable that an important if not the main motivation of Congress in [fol. 32] enacting the Tort Act was to transfer such claims to the courts. But so far as I am aware, private bills for

the benefit of soldiers for damages resulting from service-connected injuries were at least not common, in view of the long established provisions for the armed forces, including the Veterans' Administration established during or shortly after the First World War. It is probable, therefore, that claims of that nature, as illustrated by the instant case, were not within the contemplation of Congress in enacting this particular legislation.

What Congress must have specially had in mind was the ordinary run of tort claims affecting ordinary citizens or others arising from time to time. This is apparent from the phraseology adopted in section 410(a) furnishing the test of liability "in accordance with the law of the place where the act or omissions occurred." And this particular purpose of the Act becomes even more apparent when reference is made to the Committee Reports of the Senate and House in submitting the Legislative Reorganization Act. Thus, ~~it was~~ said in Senate Report No. 1400, and also in the House Committee report of July 22, 1946, in summarizing the existing law and purpose of the Tort Act as follows:

"As a result of the statutes briefly summarized above, the Government is subject to suit in contract, on admiralty and maritime torts, and for patent infringement. On the other hand, no action may be maintained against the government in respect to any *common-law tort*. The existing exception in respect to *common-law torts* appears incongruous. Its only justification seems to be historical. With the expansion of governmental activities in recent years, it becomes especially important to grant to *private individuals* the right to sue the government in respect to such torts as negligence in the operation of vehicles." (Italics supplied.)

And again in commenting on the stated exceptions to the Act appearing in section 421, it was said that the exceptions include "claims which relate to certain governmental activities which should be free from the threat of damage suits, or for which adequate remedies are already available."

I do not interpret the reference to common-law torts in the strictly technical sense of the term because the test of liability as stated in section 410(a) is somewhat broader in that it would include statutory torts, such as suits under

Lord Campbell's Act for death claims provided for by the [fol. 33] statutes of the particular States, which were not theretofore cognizable at common law. But it would seem clear enough that injuries sustained by members of the armed forces of the United States during their service would not be within the general scope of the kinds of actions to which the Committee Report was referring because it is clear enough that such injuries did not constitute common law or statutory torts under the laws of the several States. Indeed, it is not understandable how any State legislation could properly have affected the relations of the United States to members of its armed forces which, of course, depended purely on federal law.

Still further support for the conclusion reached is to be found in the recent decision of the Supreme Court in *United States vs. Standard Oil Co. of California*, 332 U. S. 301, where the dominant issue was whether the United States was subrogated to the right of action of a soldier against a third person, by reason of expense incurred by the government in caring for its soldiers under existing federal legislation. The court held that the right of subrogation did not exist because not provided for in federal law, and that it would be incongruous to give such a right of action in view of the variable State laws which might apply to any particular soldier dependent upon where he happened to be at the time. Thus in the opinion it was said:

"Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies, across state lines."

And again (page 305) —

"Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces \* \* \* the scope, nature, legal incidents and

consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority."

The case strongly emphasizes the particular nature of government-soldier relationship and this furnishes strong support for the view that it was not the intention of Congress in passing the Tort Claims Act to include in the phrase "any claim" those by former soldiers for service-connected [fol. 34] disabilities for which there was already existing a large body of federal legislation.

Again it may be noted that section 410(a) also provides with respect to the test of liability as follows:

"Subject to the provision of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances,".

This phraseology is seemingly inapt if it had been the intention of Congress to give soldiers additional redress for service-connected disabilities. It is hardly conceivable to analogize the liability of the United States to that of a private individual in respect to service-connected disabilities in view of the government-soldier particular relationship.

It is also to be noted that section 424(a) of the Act (not included in codification in 28 U.S.C.A., ss. 931, et seq.) repeals certain specific statutes authorizing "any Federal agency to consider, ascertain, adjust or determine claims on account of damage to or loss of property, or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, \* \* \* in respect of claims cognizable under Part 2 of this title" (which provides for an administrative action) and accruing on and after January 1, 1945, including, among other statutes so repealed "Public law numbered 112, as amended, Seventy-eighth Congress, approved July 3, 1943 (57 Stat. 372, U.S.C., title 31, secs. 223b, 223c and 223d)." Section 223(b) known as the Military Claims Act, authorized the Secretary of the Army to determine, settle and pay any claims for damages not in excess of \$1,000 "caused by military personnel or civilian employees



of the Department of the Army". Counsel for the respective parties advance contrary arguments from this repealing section of the Act. For the plaintiff, it is argued that prior to the Act it was the policy of Congress by the Military Claims Act to recognize claims by as well as against military personnel at least up to \$1,000; and that the provision was repealed because thereafter such claims were comprehensively covered by the Tort Act. But to the contrary, counsel for the government points out that [fol. 35] by the amendment of May 29, 1945, the prior Act of 1943 was amended to exclude "claims for personal injury or death of military personnel or civilian employees of the Department of the Army or of the Army, if such injury or death occurs incident to their service". This, he says, is indicative of the general policy of Congress not to recognize claims by military personnel for injuries occurring incident to their services, other than through pensions or Veterans disability allowances. And he further points out that anyhow the Military Claims Act authorizes settlement only up to \$1,000 and the purpose of the repeal was because the Act was no longer necessary by reason of the provisions of Part 2 of Title IV of the Tort Act which provided for administrative adjustment of tort claims against the United States. The latter reason for the repeal seems sound and I therefore find no reason to think that the repeal of this particular statute aids the plaintiff's construction of the Act. On the contrary, the quoted proviso in the Military Claims Act is at least indicative of general congressional policy not to recognize claims by military personnel for service-connected disabilities otherwise than through the general statutory provisions.

The government relies on some other defenses which need be only mentioned. The most important of these is the contention that even if the Tort Act covers this case the voluntary acceptance of veterans' benefits by the plaintiff constitutes an election to rely upon that form of relief and excludes the right to have a cumulative remedy by suit for tort. In support of this contention counsel cite cases to the effect that suits by various employees of the United States to recover for injuries sustained from other employees of the government, acting in the course of their duties, have been barred by the voluntary acceptance of benefits under the Federal Employees Compensation Act, covering civilian as distinct from military personnel. These

cases were referred to in the prior opinion in this case but without the necessity of expressing an opinion thereon.<sup>2</sup> While there is at least a plausible analogy between the [fol.36] principles involved in the cases cited and that of the instant case, I do not find it necessary to now base a decision thereon in view of the conclusion already reached.

Because the cause of action, if any, in this case, arose in the State of Virginia, it is contended that the limitation statute of that State should be here applied instead of the law of the forum. It is said that the Virginia Code of 1942, s. 5818, established a period of one year for a suit of this nature and that the instant suit was not brought within one year. But this contention is now clearly untenable in view of the decision in the Burkhardt case, *supra*, that the limitation period in the Tort Claims Act itself is controlling. As provided in section 420 of the Act, the suit was brought within one year thereafter.

Counsel for the government also contends that as the test of liability is that established by the law of the place where the cause of action arose, in this case Virginia, the defense of the fellow-servant doctrine which exists in Virginia in cases of suits for damages resulting from negligence, should apply. But it seems quite clear that this defense would not be applicable in the instant case, where a surgical operation is performed upon the plaintiff, because the operating surgeon and the patient could not fairly be described as co-workers even if they were co-employees of the same employer.

In view of the conclusion reached as to the scope of the Act it was of course unnecessary to make specific findings of fact with regard to the act of negligence alleged by the plaintiff. But I have done so in this case in view of the doubtful question of the proper coverage of the Act, and

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<sup>2</sup>The cases referred to are *Bradey vs. Roosevelt S.S. Co.*, 317 U. S. 575, 577, 581; rehearing denied 318 U. S. 799; *Dahn vs. Davis*, 258 U. S. 421; *Milletano vs. United States*, 55 F.S. 904 (N.Y.); *United States vs. Marine*, 155 F. 2d. 456, affirming 65 F.S. 111 (D.C. Md.); See also the discussion in a case note in Vol. 61 *Harvard Law Review* 550, on the former opinion in this case; and an analysis of the Tort Act by District Judge Hulén, printed in 7 *Fed. Rules Dec.* pp. 689, 694, 695.

for the purpose of possibly avoiding the necessity of further loss of time and expense to the parties and witnesses for a retrial, in the event that the case should be appealed and it should be finally held that the case is covered by the Act.

As previously indicated, the case is a difficult one on the facts as well as on the law. The nature of the suit is a typical one for professional malpractice; but nevertheless the facts of the particular case are quite unusual and the conclusion which I have reached on the facts that there was negligence proximately resulting in damage to the [fol. 37] plaintiff is not free from all doubt. However, in view of the length of this opinion and the prior opinion in the same case, I will not unduly prolong discussion of the facts because, although they are unusual, after all it is merely a fact question to be determined by the court without a jury. The plaintiff is not obliged to prove the fact beyond a reasonable doubt, but only by a preponderance of the evidence. To establish the negligence plaintiff's counsel relies strongly upon the common law doctrine or rule of *res ipsa loquitur*. It is conceded by counsel on both sides that the rule applies in proper cases both under the Virginia and Maryland decisions and my attention has not been directed to any important difference between the two States with respect to the application of the rule to the instant case.<sup>3</sup> But the rule itself is only one from which after proof of the main fact alleged by the plaintiff, the trier of facts is permitted to infer negligence in the absence of a sufficient exculpatory explanation by the defendant. In this case the fact alleged by the plaintiff is the negligent failure of the defendant to remove a towel from his abdomen or stomach which had been placed there in the course of surgical operation on July 3, 1945 at Fort Belvoir, Virginia. There is no direct proof of this particular fact alleged and the rule of *res ipsa loquitur* would not of itself be sufficient to prove the fact as well as the inference of

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<sup>3</sup> For a review of the Maryland cases, see an extended paper upon the subject by Mr. Roszel C. Thomsen of the Baltimore Bar, to be found in Vol. III Maryland Law Review, pp. 285 to 313. See also for a recent discussion of the rule in this Fourth Circuit, *Lachman vs. Penn Greyhound Lines*, 160 F. 2d. 496; *Coca-Cola Bottling Co. vs. Munn*, 99 F. 2d. 190.

negligence. However, on the evidence as a whole, I have found as a fact that the towel must have been placed or left in the plaintiff's body at Fort Belvoir, Virginia. And having thus found this fact the rule justifies the inference that there must have been negligence in leaving the towel in the plaintiff's body, in the absence of any convincing evidence of the lack of negligence in doing so. The only evidence submitted by the defendant with respect to the operation in question was to the effect that no towel was used in the operation. Of course if the trier of facts so found, that would be an end of the plaintiff's case. But as I have felt [fol. 38] obliged to reject this conclusion of fact, I must treat the case as one where the fact has been proved and there is no explanation by the defendant of how the very unusual fact occurred.

For the reasons stated, I have concluded that the complaint must be dismissed with allowance of the usual taxable court costs. Counsel may submit the appropriate order in due course.

W. Calvin Chesnut, U. S. District Judge.

[fol. 39] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF MARYLAND

Civil No. 3692

ARTHUR K. JEFFERSON

VS.

UNITED STATES OF AMERICA

ORDER DISMISSING BILL OF COMPLAINT—Filed May 11, 1948

This cause of action having come on for trial on the allegations made in the Bill of Complaint and the defenses set forth in the amended answer thereto, and this Court having heard the testimony of the witnesses for both sides and argument of counsel, and being fully advised in the premises, it is

Ordered, this 11th day of May, 1948, that the Complaint be and the same is hereby Dismissed with allowance of the usual taxable Court costs for the reasons set forth in the written opinion and findings of this Court filed on May 7, 1948.

W. Calvin Chesnut, United States District Judge.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS—Filed  
July 6, 1948

Notice is hereby given that Arthur K. Jefferson, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the final judgment entered in this action on May 11, 1948.

Dated: July 7, 1948.

Morris Rosenberg, Robert H. Archer, Jr., 405 Davison Building, Baltimore—1, Maryland, Attorneys for Appellant.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PLAINTIFF AND ORDER OF COURT EXTENDING  
TIME FOR FILING AND DOCKETING APPEAL—Filed August  
12, 1948

The petition of Arthur K. Jefferson, plaintiff in the above-entitled and numbered case, respectfully represents:

1. On July 6, 1948, your petitioner filed a notice of appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the final judgment of this Honorable Court denying him relief under The Federal Tort Claims Act and the 40 days for perfecting the appeal will expire on August 18, 1948.

2. Your petitioner has been advised by counsel that it is questionable whether he may proceed in *forma pauperis* despite lack of funds since counsel has the case on a contingent fee basis and it may therefore become necessary for your petitioner to try to borrow funds if the appeal is to be prosecuted.

3. Under the circumstances, your petitioner would like to have as much time as possible to determine whether to prosecute the appeal, and he prays that this Honorable Court pass an order extending the time for filing the record



on appeal and docketing the appeal to and including October 4, 1948.

Morris Rosenberg, Robert H. Archer, Jr., Attorneys  
for Plaintiff.

### CONSENT

The defendant hereby consents to the passage of an order as prayed.

Bernard J. Flynn, United States Attorney, James  
B. Murphy, Assistant United States Attorney, At-  
torneys for Defendant.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

### ORDER

Upon the foregoing petition and consent, it is ordered this 12th day of August, 1948, by the District Court of the United States for the District of Maryland that the time for filing the record on appeal and for docketing the appeal in the above-entitled cause be, and the same is hereby, enlarged and extended to and including October 4, 1948.

W. Calvin Chesnut, United States District Judge.

[fol. 43] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND  
ORDER OF COURT THEREON—Filed September 13, 1948

STATE OF MARYLAND,

City of Baltimore, ss:

Arthur K. Jefferson, being duly sworn, deposes and  
says:

1. I am a citizen of the United States.
2. I am the plaintiff in the above entitled action which was brought by me under the Federal Tort Claims Act

(revised 28 USC, sections 1346(b), 1402, 2402, 2411, 2412, 2674, etc.), and I am entitled to maintain the said action.

3. The said action came on for trial before this Court and a judgment was rendered therein against me by this Court on the 11th day of May, 1948.

4. I have filed a notice of appeal from said judgment to the United States Court of Appeals for the Fourth Circuit, and pursuant to an order of this Court, passed in this action on the 12th day of August, 1948, may file the record on appeal and docket the appeal on or before October 4, 1948.

[fol. 44] 5. My appeal is based upon the ground that a soldier of the United States Army is entitled to the benefit of the Federal Tort Claims Act when injured by other military personnel while both were acting in line of duty.

6. I believe I am entitled to the redress sought to be obtained in said action and by said appeal.

7. Because of my poverty, I am unable to pay the costs of said appeal or to print the record therein or to give security for the same.

8. There is no person interested by contract or otherwise in the said appeal or entitled to share in any recovery thereunder, who is able to pay or secure said costs, except my attorneys who are entitled to share in any recovery only to the extent that this Court may allow them a fee within the limits prescribed by Section 2678 of Revised Title 28 of the United States Code.

9. Unless I am permitted to proceed *in forma pauperis* in the United States Court of Appeals for the Fourth Circuit for a review of the above entitled action, I will be utterly unable to rectify the judgment of this Court.

Wherefore, deponent prays that he may have leave to prosecute the said appeal *in forma pauperis*, pursuant to the provisions of Section 1915 of Revised Title 28 of the United States Code.

Arthur K. Jefferson, Plaintiff.

Subscribed and sworn to before me, a Notary Public of the State of Maryland, in and for the City of Baltimore, this 10th day of September, 1948.  
Ethel V. McKean, Notary Public (Notarial Seal).

[fol. 45] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER

This cause coming on to be heard upon the application of Arthur K. Jefferson, Petitioner, to be allowed to prosecute his appeal to the United States Court of Appeals for the Fourth Circuit *in forma pauperis*, and based upon affidavit of the said Arthur K. Jefferson verified the 10th day of September, 1948, and filed in accordance with the provisions of Section 1915 of revised Title 28 of the United States Code, it is

Ordered this 13th day of September, 1948 that the said Arthur K. Jefferson be allowed to prosecute his appeal to the United States Court of Appeals for the Fourth Circuit without being required to prepay fees or costs before or after bringing said appeal and without making a deposit or executing a bond for costs because of his poverty as alleged in said affidavit.

And it is further ordered that all judicial officers who have occasion to perform services therein shall perform the same as if the deposit for costs or security for costs had been given.

W. Calvin Chesnut, United States District Judge.

[fol. 46] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

JOINT DESIGNATION AS TO RECORD ON APPEAL—Filed September 17, 1948

It is hereby stipulated by and between counsel for the parties hereto that there shall be but one transcript of record on appeal in the above entitled case and that the record on appeal in said case shall consist of the following items:

1. The Complaint.
2. Amended Answer to the Complaint.
3. Order of Court dismissing the Complaint.
4. Opinion of the Court.

5. Notice of Appeal.
6. Petition and Consent and Order of Court thereon extending the time for filing the record on appeal and docketing the appeal.
7. Affidavit for leave to proceed *in forma pauperis* and order of court allowing plaintiff to prosecute his appeal to the United States Court of Appeals for the Fourth Circuit *in forma pauperis*.
8. A concise statement of the point relied on.
9. This Stipulation.

Morris Rosenberg, Robert H. Archer, Jr., Attorneys for plaintiff-appellant.

Bernard J. Flynn, United States Attorney; James B. Murphy, Assistant United States Attorney; Attorneys for defendant-appellee.

[fol. 47] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF POINT RELIED ON BY PLAINTIFF—Filed Sept. 17, 1948

Plaintiff is entitled to a money judgment against the Government under the pertinent provisions of the Federal Tort Claims Act (revised Title 28 USC, sections 1291, 1346(b), 1402, 2402, 2411, 2412, 2671, 2674, and 2680), for the injuries which the United States District Court found he sustained on July 3, 1945 as a direct result of an abdominal operation negligently performed on him by Government employees at Fort Belvoir, Virginia while he was a soldier of the Army of the United States.

Morris Rosenberg, Robert H. Archer, Jr., Attorneys for Plaintiff.

Service of copy admitted this 17th day of September, 1948.

Bernard J. Flynn, United States Attorney; James B. Murphy, Assistant United States Attorney; Attorneys for Defendant.

[fol. 48] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO ADDITION TO RECORD ON APPEAL—Filed  
September 28, 1948

It is stipulated and agreed between counsel in the above-entitled cause of action that in addition to the papers designated in the joint designation as to the record on appeal filed in this case that the opinion of the District Court filed in this case on October 23, 1947 be included among the record on appeal.

Bernard J. Flynn, United States Attorney; James B. Murphy, Assistant United States Attorney; Attorneys for Defendant. Morris Rosenberg, Attorney for Plaintiff.

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 50] IN THE UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

No. 5815

ARTHUR K. JEFFERSON, Appellant,

VERSUS

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the  
District of Maryland, at Baltimore

October 6, 1948, the transcript of record is filed and the cause docketed.

Same day; petition and order extending the time to and including October 4, 1948, within which to file the record on appeal and docket the appeal, are filed.



## IN UNITED STATES COURT OF APPEALS

AFFIDAVIT FOR LEAVE TO PROCEED IN FORMA PAUPERIS—Filed  
October 6, 1948

STATE OF MARYLAND,  
City of Baltimore, ss:

Arthur K. Jefferson, being duly sworn, deposes and says:

1. I am a citizen of the United States.
2. I am the appellant in the above entitled action which was brought by me under the pertinent sections of the Federal Tort Claims Act (28 USCA, Sections 921 et seq. prior to its recodification under the new Judicial Code) and I am entitled to maintain the said action.
3. The said action came on for trial before the United States District Court for the District of Maryland and a judgment was rendered therein against me by said Court [fol. 51] on the 11th day of May, 1948.
4. I have filed a notice of appeal from said judgment to this Court, and, pursuant to an order of the United States District Court for the District of Maryland, dated the 13th day of September, 1948, I was authorized to prosecute the appeal *in forma pauperis*.
5. My appeal is based upon the ground that a soldier of the United States Army is entitled to the benefit of the Federal Tort Claims Act when injured by other military personnel while both were acting in line of duty.
6. I believe I am entitled to the redress sought to be obtained in said action and by said appeal.
7. Because of my poverty, I am unable to pay the costs of said appeal or to give security for the same.
8. There is no person interested by contract or otherwise in the said appeal or entitled to share in any recovery thereunder, who is able to pay or secure said costs, except my attorneys who are entitled to share in any recovery only to the extent that the United States District Court for the District of Maryland may allow them a fee within the limits prescribed by Section 2678 of Revised Title 28 of the United States Code.

9. Unless I am permitted to proceed *in forma pauperis* in this Court for a review of the above entitled action, I will be utterly unable to rectify the judgment of the United States District Court for the District of Maryland.

Wherefore, deponent prays that he may have leave to prosecute the said appeal *in forma pauperis*, pursuant to the provisions of Section 1915 of Revised Title 28 of the [fol. 52] United States Code.

Arthur K. Jefferson, Appellant.

Subscribed and sworn to before me, a Notary Public of the State of Maryland, in and for the City of Baltimore, this 5th day of October, 1948. Ethel V. McKean, Notary Public.

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IN UNITED STATES COURT OF APPEALS

ORDER PERMITTING APPELLANT TO PROSECUTE APPEAL IN  
FORMA PAUPERIS—Filed and entered October 6, 1948

Upon the affidavit and petition of the appellant, and for good cause shown,

It is ordered that the appellant in the above entitled cause be, and he is hereby, permitted to prosecute his appeal in this Court *in forma pauperis*, and to file six (6) typewritten copies of his brief and appendix instead of twenty-five (25) printed copies as required by the Rules. October 6th, 1948.

John J. Parker, Chief Judge Fourth Circuit.

October 6, 1948, the appearance of Morris Rosenberg and Robert H. Archer, Jr., is entered for the appellant.

October 14, 1948, the appearance of H. G. Morison, Assistant Attorney General; Morton Hollander, Attorney, Department of Justice; Bernard J. Flynn, U. S. Attorney, and James B. Murphy, Assistant U. S. Attorney, is entered for the appellee.

October 18, 1948, brief on behalf of the appellant is filed.

November 2, 1948, brief on behalf of the appellee is filed.

[fol. 53] IN UNITED STATES COURT OF APPEALS

ARGUMENT OF CAUSE

November 17, 1948, (November term, 1948) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

IN UNITED STATES COURT OF APPEALS

ORDER DEFERRING DECISION—Filed and Entered January 4, 1949

The decision of this Court in the above entitled case be, and it is hereby, deferred, pending the action of the Supreme Court in cases now pending before it involving the same question of law.

January 4th, 1949.

John J. Parker, Chief Judge Fourth Circuit.

June 2, 1949, the appearance of Morton Hollander is entered for the appellee.

June 10, 1949, joint application of the parties for a continuance of the re-argument is filed.

IN UNITED STATES COURT OF APPEALS

ORDER CONTINUING RE-ARGUMENT—Filed and Entered June 13, 1949

Upon the application of the appellant, by his counsel, and for good cause shown.

It is ordered that the re-argument of the above entitled case be, and the same is hereby, continued from the June Term, 1949, of the Court, to the October Term, 1949, of the Court.

June 13, 1949.

John J. Parker, Chief Judge, Fourth Circuit.

September 13, 1949, brief of appellant on re-argument is filed.

October 29, 1949, brief on behalf of appellee on re-argument is filed.

[fol. 54] IN UNITED STATES COURT OF APPEALS

RE-ARGUMENT OF CAUSE

November 8, 1949, (November term, 1949) cause came on again to be heard before Parker, Soper and Dobie, Circuit Judges, and was re-argued by counsel and submitted.

[fol. 55] IN UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

No. 5815

ARTHUR K. JEFFERSON, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the  
District of Maryland, at Baltimore

CIVIL

(Re-Argued November 8, 1949. Decided December 19, 1949)

Before PARKER, SOPER and DOBIE, Circuit Judges.

Morris Rosenberg, (Robert H. Archer, Jr., on brief) for Appellant, and Morton Hollander, Attorney, Department of Justice, (H. G. Morison, Assistant Attorney [fol. 56] General; Bernard J. Flynn, U. S. Attorney; James B. Murphy, Assistant U. S. Attorney; Paul A. Sweeney and Massillon M. Heuser, Attorneys, Department of Justice, on brief) for Appellee.

OPINION—Filed December 19, 1949

SOPER, Circuit Judge:

This suit was brought by a member of the armed forces of the United States under the Federal Tort Claims Act, 28 U.S.C.A. § 2674 et seq., to recover for personal injuries resulting from a surgical operation performed by an army surgeon at Fort Belvoir, Virginia. It was found by Judge Chesnut at the trial in the District Court, 77 F. Supp. 706, that a towel used during an operation had been left in a

surgical wound through the negligence of government employees at the hospital, and in consequence the plaintiff had suffered serious injuries for which \$7,500 would be an appropriate verdict if the case were tenable. The judge held, however, that the statute was not intended to cover claims by members of the armed forces of the United States for service connected injuries suffered while in the service. He therefore dismissed the case on motion of the United States and this appeal followed.

In the meantime the Supreme Court, upon an appeal from this court, rendered its decision in *Brooks v. United States*, 337 U. S. 49, in which it held that two soldiers riding in their own automobile while on leave were entitled to recover for injuries received when they were struck by a United States Army truck driven by a civilian employee of the Army. That decision established that members of the armed forces of the United States can recover under the Federal Tort Claims Act for injuries not incident [fol. 57] to their service, but left open the question whether the statute also covers claims by service men for injuries incident to their service. The court said: (pp. 52-3)

"The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do *Dobson v. United States*, 27 F. 2d 807, *Bradley v. United States*, 151 F. 2d 742, and *Jefferson v. United States*, 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U.S.C. § 223b. Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U. S. 198. The Government fears may have point in reflecting congressional purpose to leave injuries incident to service where



they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us."

[fol. 58] Since this decision was rendered, the question not decided by the Supreme Court has been considered in the Second and Tenth Circuits which came to opposite conclusions. In *Feres, Ex'r v. United States*, 2 Cir., decided Nov. 4, 1949, it was held that the estate of an army officer killed in a fire in unsafe army barracks in which he had been quartered through the negligence of superior officers was not entitled to recovery for his death; but in *Griggs, Ex'r v. United States*, 10 Cir., November 16, 1949, it was held that the estate of an army officer could recover under the act for his wrongful death caused by the negligence of members of the Army Medical Corps while he was under medical treatment. The Second Circuit based its decision largely upon the provision which Congress has made for military persons in the form of disability payments and pensions. The Tenth Circuit found more persuasive the broad language of the statute and the fact that Congress failed to except service connected injuries of military personnel although bills containing such exceptions had been presented for its consideration.

We are in accord with the conclusions reached by the Second Circuit. The choice lies between a literal interpretation of the Act and a construction which recognizes the peculiar relationship that exists between a member of the armed services and superior military authority. Congress was plainly impressed with the large number of justified complaints on the part of persons injured through the negligence of employees engaged in the manifold activities of the federal government, and found it desirable to modify the government immunity from suit and to give relief to injured persons through the procedure of the courts rather than through private statutes which burdened the legislative [fol. 59] branch of the government and caused delay in the consideration of complaints. Hence the Federal Tort Claims Act was passed. It seems unreasonable, however, to conclude that Congress, while accomplishing these desirable purposes, intended at the same time to subject every injury sustained by a member of the armed forces in the

execution of military orders to the examination of a court of justice if the injured person should make the claim that his injury was caused by the negligence of a superior officer. If this were so, the civil courts would be required to pass upon the propriety of military decisions and actions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States. We think this consideration too weighty to be swept aside by adverting to the exceptions relating to military personnel which were contained in bills submitted to Congress when the matter was under examination. When a statute is subjected to the interpretation of the courts, too much weight should not be given to the language contained in discarded measures or to the statements of legislators in the course of debate. *Order of Conductors v. Swan*, 329 U. S. 520, 529. *Jewell Ridge Corp. v. Local*, 325 U. S. 161, 168.

This conclusion is fortified by the considerations enumerated and relied on in the opinion of Judge Chesnut and that of the Second Circuit in the Feres case. The distinctively federal character of the government-soldier relationship is recognized in *United States v. Standard Oil Co.*, 322 U. S. 301, 305, where the extent to which state law may govern the relationship between military personnel and persons outside the military establishment was contrasted with [fol. 60] the complete subjection to federal authority of the relationship between persons in the military service and the government itself. That state law governs in suits under the Federal Tort Claims Act is shown by the provision that the United States is liable for injuries caused by the negligence of a government employee acting within the scope of his employment under circumstances where a private person would be liable to the claimant under the law of the place where the act of omission occurred; but it is not reasonable to suppose, in the absence of an express declaration on the point, that Congress intended to adopt so radical a departure from its historic policy as to subject internal relationships within the military establishment to the law of negligence as laid down by the courts of the several states.

The service man is not left without protection by the interpretation of the statute, for as pointed out in the

opinion of the District Court, 76 Fed. Supp. 711, Note 1, Congress has long had in mind the peculiar dangers to which the military man is exposed, and has accordingly made elaborate provisions for pay and allowances and retirement benefits for persons in the Army and the Navy, in addition to medical and hospital treatment, which are always available. An analogous situation in suits by seamen against the United States under the Public Vessels Act led the court to decide that the permission granted to persons to libel the United States in personam for damages caused by the negligent handling of a public vessel refers to damages suffered by third persons but not by members of the ship's company. *Dobson v. United States*, 2<sup>nd</sup> Cir., 27 F. 2d 807; *Bradey v. United States*, 2 Cir., 151 F. 2d 742.

Affirmed.

[fol. 61] IN UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

No. 5815

ARTHUR K. JEFFERSON, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the  
District of Maryland

JUDGMENT—Filed and entered December 19, 1949

This cause came on again to be heard on the transcript of the record from the United States District Court for the District of Maryland, and was re-argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Chief Judge, Fourth Circuit; Morris  
A. Soper, U. S. Circuit Judge; Armistead M. Dobie,  
U. S. Circuit Judge.

[fol. 62] January 20, 1950, petition of appellant for a stay of mandate is filed.

## IN UNITED STATES COURT OF APPEALS

ORDER STAYING, MANDATE—Filed January 25, 1950

Upon the petition of the appellant, by his counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the said appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

January 24, 1950.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 63] IN UNITED STATES COURT OF APPEALS

ORDER AUTHORIZING CLERK TO USE ORIGINAL TRANSCRIPT OF RECORD IN MAKING UP RECORD FOR USE IN THE SUPREME COURT OF THE UNITED STATES ON APPLICATION FOR WRIT OF CERTIORARI

FOR REASONS APPEARING TO THE COURT,

It is ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further ordered that a copy of this order be incorporated in said certified transcripts of records.

January 9th, 1941.

John J. Parker, Senior Circuit Judge.

[fol. 64] Clerk's Certificate to foregoing transcript omitted in printing.



[fol. 65] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1949

No. 381, Misc.—

ARTHUR K. JEFFERSON, Petitioner,

vs.

THE UNITED STATES OF AMERICA

On petition for writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA  
PAUPERIS; GRANTING PETITION FOR CERTIORARI ETC.—March  
13, 1950

On consideration of the motion for leave to proceed herein  
in forma pauperis and of the petition for writ of certiorari,  
it is ordered by this Court that the motion to proceed in  
forma pauperis be, and the same is hereby, granted; and  
that the petition for writ of certiorari be, and the same is  
hereby, granted. The case is ordered transferred to the  
appellate docket as No. 667 and assigned for argument  
immediately following No. 558, *Feres vs. United States*.

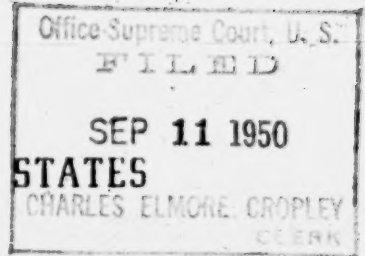
It is further ordered that the duly certified copy of the  
transcript of the proceedings below which accompanied the  
petition shall be treated as though filed in response to such  
writ.

Mr. Justice Douglas took no part in the consideration or  
decision of this application.

(7261)



**LIBRARY**  
**SUPREME COURT, U.S.**



**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1950**

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**No. 29**

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**ARTHUR K. JEFFERSON,**

*Petitioner,*

*vs.*

**THE UNITED STATES OF AMERICA**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF AP-  
PEALS FOR THE FOURTH CIRCUIT**

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**BRIEF FOR PETITIONER**

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**MORRIS ROSENBERG,**

**HENRY M. DECKER, JR.,**

*Baltimore, Maryland,*

*Counsel for Petitioner.*

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1950**

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**No. 29**

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**ARTHUR K. JEFFERSON,**

*Petitioner,*

*vs..*

**THE UNITED STATES OF AMERICA**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF AP-  
PEALS FOR THE FOURTH CIRCUIT**

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**BRIEF FOR PETITIONER**

---

**Opinion in the Court Below**

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 178 F. 2d 518. The opinions of the United States District Court for the District of Maryland are reported in 74 F. Supp. 209 and 77 F. Supp. 706.

**Jurisdiction**

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on 19 December 1949. Cer-



tiorari to review the judgment of the Court of Appeals for the Fourth Circuit was granted by this Court on 13 March 1950, upon a petition theretofore filed on 18 February 1950, and based upon Section 1254 (1) of Title 28, United States Code. This case presents a situation where the United States Court of Appeals for the Fourth Circuit has rendered a decision in conflict with another United States Court of Appeals on the same matter. See *Griggs v. United States*, 178 F. 2d 1.

### Statement of the Case

This action was brought on 31 July 1947 (R. 1) under the Federal Tort Claims Act (Act of 2 August 1946, c. 753, Title IV, 60 Stat. 842; 28 U.S.C. 931, *et seq.*)<sup>1</sup> The Government's motion to dismiss was overruled without prejudice on 29 October 1947. See *Jefferson v. United States*, 74 F. Supp. 209.

From the evidence presented at the trial, the District Court (Chesnut, J.) found, briefly summarized, the following facts:

On 3 July 1945, the petitioner, then a sergeant in the Army of the United States, underwent an abdominal operation at the Army hospital at Fort Belvoir, Virginia (R. 16, 17). During the operation a towel 30 inches long by 18 inches wide, bearing the legend "Medical Department U. S. Army," was negligently left in his abdomen (R. 21). He was honorably discharged from the Army on 9 January

<sup>1</sup> On 1 September 1948, while this action was pending, the new Judicial Code became effective. In it the provisions of the Act were recodified as Sections 1346 (b), 2401 (b) and 2671-2680. Since the rights of litigants of impending actions are preserved as they were under the prior law (Section 2(b) of Act of 25 June 1948, P. L. 773, 80th Congr. 2d Sess.), we will refer to the Sections in the Act as originally enacted. The Government has not contended that the change in wording in the recodification was intended to narrow the scope of jurisdiction of the Act.

1946 (R. 17), and the towel was not removed until it was discovered during a subsequent emergency operation at The Johns Hopkins Hospital in Baltimore on 13 March 1946 (R. 17-18). As a post-operative result of the removal of the towel, petitioner, a mechanic by trade, sustained a serious hernia, and is totally and permanently disabled (R. 18-19). After deducting past and prospective Veterans Administration benefits, the District Court concluded that, if the action is maintainable under the Tort Claims Act, petitioner is entitled to a verdict of \$7500.00 (R. 21). Ruling, however, as a matter of law, that the Tort Claims Act does not cover the situation presented by this case, the District Court dismissed the action (R. 31). The judgment of the District Court was affirmed by the Court of Appeals for the Fourth Circuit on the same ground (R. 43-45).

### **Errors Below Relied on Here**

Petitioner submits that the lower court was in error in deciding:

That the Federal Tort Claims Act does not permit petitioner to recover on his claim for injuries negligently inflicted upon him by Government personnel while he, as a member of the armed forces, was undergoing treatment in an Army hospital.

### **Questions Presented**

In *Brooks v. U. S.*, 337 U. S. 49, 93 L. Ed. 1200, this Court held that the Government is liable under the Federal Tort Claims Act to a soldier on furlough for injuries then tortiously inflicted by other military personnel. The question presented here is:

Is a soldier on hospital status in an army hospital, as distinguished from military duty, entitled to recover for injuries caused by the negligence of hospital personnel acting within the scope of their employment?

In the *Brooks* case this Court answered in the affirmative the question as to whether members of the United States armed forces can recover under the Tort Claims Act for injuries *not* incident to their service. The opinion in the *Brooks* case expressly reserved, however, the question as to whether servicemen can recover under the Act for injuries *incident* to their service (337 U. S. 49, 52; 93 L. Ed. 1200, 1204). Here, consequently, two questions are presented:

(1) was petitioner's injury incident to his service?; and

(2) if his injury was incident to his service, can he recover under the Tort Claims Act?

## ARGUMENT

### I

#### **Was Petitioner's Injury Incurred Incident to His Service?**

Petitioner urges that his injury was not "incident to his service", in the ordinary connotation of the phrase, and hence maintains that he should be entitled to recover under the *Brooks* decision.

Petitioner's injury was not an injury incurred in the performance of petitioner's normal and usual military duties, incurred as it was while he was a patient in an Army hospital receiving treatment for cholecystitis (R. 17), an organic ailment wholly unconnected with his service in the armed forces. It might be contended that petitioner was required to undergo the hospital treatment for the purpose of maintaining his military fitness but, by analogy, the same argument might have been advanced in the *Brooks* case, i.e., that the military personnel there were on furlough for the purpose of rest and rehabilitation designed to better

suit them for military service. The risks and dangers ordinarily incident to military service do not include injuries resulting from the negligence of an Army surgeon in the treatment of an ailment unconnected with such service. Petitioner's injuries were incident to his service only "in the sense that all human events depend upon what has already transpired", as Mr. Justice Murphy expressed it in the opinion in the *Brooks* case. The word "incident" means apt to occur. *Smith v. New York Life Ins. Co.*, 86 N. E. 2d 340, 342, — La. —. And it has been held that the negligence of a fellow servant is not an "incident of the employment" and the servant does not assume the risks thereof unless they are obvious and patent. *Smith v. Stuart C. Irby Co.*, 151 S. W. 2d 996, 997, 998, 202 Ark. 736. Surely petitioner's injury was not such as was apt or likely to occur in connection with his military service.

The phrase "incident to his service" has not been defined by statute. The Judge Advocate General of the Army, however, has said that the phrase, as used in connection with property claims, refers to "damages, loss or destruction of property being used by the claimant in the actual performance of some official duty at the time the damage, loss or destruction occurs . . .". See "Claims By and Against the Government", Judge Advocate General's School Text No. 8, p. 39 (1944).

It is true that petitioner was on "active duty" while hospitalized, but so were the Brooks brothers on "active duty" while on furlough. See *Moore v. United States*, 48 Ct. Cl. 110, 113. The decision of the Second Circuit in *Feres v. United States*, 177 F. 2d 535, 537, erroneously regards the servicemen in the *Brooks* case as not having been on "active duty". They were.

A soldier on furlough receives army pay and allowances (see The Judge Advocate General's School Text No. 3

"Military Affairs" p. VIII-25), is subject to the Articles of War and courts-martial (see Manual For Courts-Martial. U. S. Army—1949—par. 10, pp. 10-11), and is entitled to army hospitalization and medical care (see second Fourth Circuit decision in *Brooks* case, 176 F. 2d 482). If injured while on furlough and discharged from the Army, he is entitled to benefits under the Veterans Act only because he was disabled in line of duty while on *active* duty. Active duty status is one of the prerequisites of the Veterans Act of 1924, as amended, which provides for the payment of disability benefits (38 USCA 701 (a)) to:

"(a) Any person who served in the active military or naval service and who is disabled as a result of disease or injury or aggravation of a preexisting disease or injury incurred in line of duty in such service."

If fatally injured while on furlough, his legal representative is entitled to the six months death gratuity (10 USCA 903 and 456a). These benefits inure to the soldier on furlough, as was illustrated in the *Brooks* case, solely because he was on *active duty* and was injured "in line of duty". The theory is set out in *Moore v. U. S.*, 48 Ct. Cl. 110, 113, *supra*:

"As a general proposition, we believe a soldier is in line of duty until separated from the service by death or discharge, if during such time he is submitting to all of its laws and regulations. \* \* \* The provisions for furloughs or leaves of absence are a part of the disciplinary regulations of the military service, and no more separate a man from the service than an order to report to a different command."

For the historical development of the rule see The Judge Advocate General's School Text No. 3 "Military Affairs" (1943 ed.) pages X-26 to X-34.



It is submitted that the decision in the *Brooks* case should control here. If the injury and death of the servicemen there was compensable under the Tort Claims Act, then this petitioner should be entitled to recover, without regard to the question of whether injuries "incident to the service" are within the purview of the Act. Whether injured on furlough or in an army hospital, each is on active duty and subject to military control though not engaged in the performance of their *normal* duties, each is entitled to the same special statutory benefits and it is submitted that both should be entitled to the benefits of the Tort Claims Act.

## II

### **If Petitioner's Injury Was Incident to His Service, Can He Recover Under the Tort Claims Act?**

The implication of this Court's opinion in the *Brooks* case, of course, was that "an army surgeon's slip of hand" (or the failure to remove a huck towel placed in a patient's stomach in the course of surgery) is an accident connected with a soldier's military career, a casualty *incident* to military service. Purposely, no opinion was expressed by the Court as to the coverage of the Federal Tort Claims Act as to injuries incident to service, such injuries, according to the *Brooks* opinion, presenting "a wholly different case". Petitioner respectfully disagrees.

The Federal Tort Claims Act was intended as a complete abandonment and a general waiver of the doctrine of sovereign irresponsibility for the torts of Government employees acting within the scope of their employment, subject only to the twelve exceptions enumerated in the Act itself. As to the question involved in the instant case, the Act is just as clear and unambiguous as it was in the *Brooks* case.

Where the words of a statute are plain, there is no room for construction; where the language is clear, it is conclusive. *Osaka Shoshen Kaisha Line v. United States*, 300 U. S. 98, 101, 81 L. Ed. 532, 534-535; *Caminetti v. United States*, 242 U. S. 470, 485, 61 L. Ed. 442, 453.

In the *Brooks* case this Court followed the literal language of the Act in permitting the petitioner there to recover, holding that the term "any claim"<sup>2</sup> as used in the Act does not mean "any claim but that of servicemen." The twelve lengthy and specific exceptions in the Act, none of which excludes servicemen, and the thirteenth exception which would have excluded service-connected claims had it not been stricken out of the bill by Congress, made it clear, in the opinion of this Court, that Congress knew what it was about when it used the term "any claim". The opinion points also to the long legislative history of the Act to show that Congress advisedly declined to exclude members of the armed forces from the benefits of the Act, for 16 of the 18 bills introduced in Congress between 1925 and 1935 for a tort claims act had proposed the exclusion of claims of servicemen (337 U. S. 49, 50, 93 L. Ed. 1200, 1203; *Griggs v. United States*, 178 F. 2d 1, 3).

As the tort claims bill was originally proposed to Congress sovereign immunity was not waived as to claims for which veterans' compensation was being paid. H. R. 7236, 76th Congress, First Session (1939) and H. R. 181, 79th

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<sup>2</sup> 28 USCA 931 (1946) provided ". . . The United States District Court shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States . . . for account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government . . .".

By the 1948 revision of the United States Code, the Federal Tort Claims Act was amended and now provides for exclusive jurisdiction "of civil actions on claims against the United States" (28 USCA 1346(b)). The change in phraseology has not been regarded as indicating a Congressional intent to narrow the scope of the Act. See *Griggs v. U. S.*, 178 F. 2d 1, 2.

Congress, First Session (1946) had a thirteenth exception excluding from "any claim":

"All claims for which compensation is provided by the . . . World War Veterans Act of 1924, as amended".

This exception would have denied a cause of action to ex-servicemen for injuries incurred on *active duty* and in *line of duty* for which veterans' benefits are payable (see 38 USCA 701 (a), *supra*, p. 6) and would have excluded the claim at bar had Congress not taken it out. Yet the court below attempts to put it back in the Act. As Chief Judge Parker said in his dissenting opinion in the *Brooks* case (169 F. 2d 840, 849) and should have said in this case: "In my opinion the court is without power to write back into an act by interpretation a section which Congress has thus deliberately omitted . . . Congress could not be presumed to intend that an exception apply, when it deliberately struck the exception from the act, upon its passage."

Judge Parker said also in his dissenting opinion in the *Brooks* case (169 F. 2d 840, 846-847) with which this Court agreed (337 U. S. 49, 51, 93 L. Ed. 1200, 1203):

"The principal question in the case is whether the court shall read into the act an exception excluding soldiers from the right to recover under its provisions. I see no basis for reading such an exception into the act. Legislation is a matter for Congress, not for the court; and the language used by Congress clearly covers soldiers as well as civilians. It is neither reasonable nor respectful to Congress for the courts to assume that the import of the general language used in the statute was not understood or that language excluding soldiers from the benefit of the act was omitted through inadvertence. The act was passed at a time when the country was deeply conscious of the rights and claims of soldiers. The greatest army in

the history of the country was being demobilized but many hundreds of thousands of men were still under arms, and it is hardly probable that Congress could have overlooked the fact that claims on their part would be covered by the general language used. \* \* \*

It is not reasonable to assume that the claims of soldiers were overlooked at a time when soldiers and their rights were so prominently in the public mind, when prior proposed legislation dealt explicitly with that matter and when the act itself repealed legislation under which limited relief could be granted them."

Petitioner proposes that the cogent reasoning of Judge Parker is equally as applicable here as in the *Brooks* case, even though this petitioner's claim be considered as one for injuries caused by or incident to his service. Pursuing Judge Parker's thoughts to a logical conclusion, it is manifest that the question here is whether the court shall read into the Act an exception excluding soldiers from the right to recover for injuries incident to their service. The language used by Congress clearly covers injuries incident to the service as well as injuries not incident to the service, and petitioner maintains that here, as in the *Brooks* case, it would be both unreasonable and disrespectful to Congress to assume that the Act was carelessly drawn or its import misunderstood.

The Tort Claims Act, passed as an integral part of the Legislative Reorganization Act of 1946 (60 Stat. 812, 842; 28 USCA 921-46), has a double purpose. It removes the anachronistic doctrine of sovereign immunity to actions in tort, thus making the Government, the largest of all businesses, liable for the negligence of its employees acting within the scope of their employment and it is designed to relieve Congress of the burden of handling the thousands of private bills for relief that heretofore were presented each year in the absence of any other remedy. See Sen. Rep. No. 1400, 79th Cong., 2d Sess. (1946) H. R. Rep. No. 1287, 79th Cong., 1st Sess. (1946).

These broad purposes show a new policy and different philosophy than that underlying the *maritime* statutes construed in *Dobson v. U. S.*, 27 F. 2d 807, and *Bradley v. U. S.*, 151 F. 2d 742, and it is submitted that these decisions should not be used to whittle down the Act by implication. In keeping with these considerations, this Court in the *Brooks* case expressly discredited the argument that the comprehensive system of special statutory benefits for service connected disabilities to servicemen showed an intent on the part of Congress to bar servicemen from the benefits of the Act (337 U. S. 49, 53; 93 L. Ed. 1200, 1204). See also *Santana v. United States*, 175 F. 2d 320. *Coytra*, see *Feres v. United States*, 177 F. 2d 535. Unlike Workmen's Compensation statutes, there is nothing in the veterans' or servicemen's benefit statutes providing for exclusiveness of remedy. If there were, this Court should have denied recovery in the *Brooks* case instead of using the statutory benefits to reduce damages assessable against the Government. On the remand of the *Brooks* case the Fourth Circuit directed the District Court to give the Government credit for army pay, for hospitalization and medical care furnished by the Government, and for veterans' benefits, in the case of the injured soldier; and for the death gratuity under 10 USC 903 in the case of the soldier who was killed in the accident. See *U. S. v. Brooks*, 176 F. 2d 482.

Long before this ruling, however, counsel for petitioner had conceded that such a reduction was proper in this case (R. 15-16) and the District Court deducted past and prospective veterans' benefits in the computation of damages to which ~~it~~ felt petitioner would be entitled, were recovery allowed (R. 21).

Thus, whenever a serviceman is permitted to recover under the Tort Claims Act he would receive but just compensation for injuries suffered by him through the negligence of other government employees, and the Government would be required to pay no more than reasonable com-



pensation, assessed by the trial court without a jury (28 USCA 931).

This court's opinion in the *Brooks* case calls attention to the *Military Claims Act* (57 Stat. 372; 31 USCA 223(b)) as possibly indicating a congressional intent to deny the general waiver of sovereign immunity to claims of military personnel for service-connected injuries because it excludes claims of military personnel for injuries or death occurring "incident to their service". The *Military Claims Act* contains the following provision:

"The provisions of this Act shall not be applicable \* \* \* to claims for personal injury or death to military personnel or civilian employees of the Department of the Army or of the Navy if such injury or death occurs incident to their service."

Petitioner denies, however, that this provision is indicative of such a congressional intent under the Tort Claims Act. The Military Claims Act dealt with claims not necessarily based on negligence; liability there existed irrespective of the fault of army civilian or military personnel, except that negligence of the claimant bars recovery. And insofar as it is concerned with claims cognizable under the Tort Claims Act, it has been repealed by Section 424 (b) of the original Tort Claims Act (28 USCA 946), though there is a saving clause as to any claim which is not caused by the *negligence* of government employees.

It does not appear from the record whether the failure to remove the towel from the petitioner's abdomen was due to negligence of military or of civilian employees of the Army (R. 21). But even if the negligence is that of a soldier instead of a civilian employee at the hospital, the Government would still be liable.

At common law a soldier is liable in tort just as any other citizen. *Little v. Barreme*, 2 Cranch. 170, 171, 2 L. Ed. 243; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471; *Franks v. Smith*,

142 Ky. 232, 134 SW 484, LRA 1915A, 1141, Ann. Cas. 1912D 319; *Bishop v. Vandercook*, 228 Mich. 299, 200 NW 278; *State v. Sparks*, 27 Tex. 627. In 1616 this principle was applied even to soldiers *inter sese*, while both were on active duty, in *Weaver v. Ward*, Hobart 134, 88 Eng. Reprint 284, 135 ALR 29. Servicemen are specifically designated as federal employees by the Tort Claims Act and Congress is presumed to know that the Government would be liable for injuries negligently inflicted upon one government employee by another under the familiar common law doctrine of *respondeat superior*, subject, of course, to the defense of the fellow servant doctrine and to other recognized defenses. And, there is nothing in the Tort Claims Act to negative this liability.

The District Court concluded that under the law of the State of Virginia as applied to the facts, tort liability had been established against the Government if sovereign immunity had been waived (R. 21, 42).

Of the 12 exceptions in the Act itself (28 USCA 943 (1946)) only 2 are relevant here: (1) Subsection (a) which exempts the Government from liability in tort in the execution of laws or for the misuse of executive discretion; and (2) Subsection (j) exempting any claim arising out of combatant activities of the armed forces.

Neither bars recovery in this case. Removal of the towel from the Petitioner's abdomen before the surgical wound was sewed up was a ministerial act requiring no exercise of judgment or discretion, or a choice of action. It should have been removed, (See *Castley v. U. S.*, 181 F. 2d 723; *Griggs v. U. S.*, 178 F. 2d 1; cf. *Denny v. U. S.*, 171 F. 2d 365; cert. den. 337 U. S. 919, 93 L. Ed. 1728) and failure to remove it was negligent performance of a ministerial act for which a Government employee has always been held liable in tort and still is under subsection (a), which codifies the common law rule. See *Tracy v. Swartwout*, 10 Pet. 80, 95, 9 L. Ed. 354, 359; *Little v. Barreme*, 2

Craneh. 170, 2 L. Ed. 243; see *Philadelphia Co. v. Stimson*, 223 U. S. 605, 618, 56 L. Ed. 570, 575 et seq.; *American School, etc. v. McAnnulty*, 187 U. S. 94, 108, 110, 47 L. Ed. 90, 96, 97; *Hopkins v. Clemson*, 221 U. S. 636, 642, 643, 645, 55 L. Ed. 890, 894, 895. Petitioner's claim arose out of noncombatant activities in Virginia and the Government has not contended that it falls within exception (j).

Another consideration raised by this Court in the *Brooks* opinion was that, "despite literal language and other considerations to the contrary", the allowance under the Tort Claims Act of claims incident to service might produce a result "so outlandish that even the factors we have mentioned would not permit recovery". Petitioner does not feel that the result would be outlandish, nor that "dire consequences" would ensue, as was urged upon this Court by the Government in the *Brooks* case.

Recovery here would not be foreign to recognized principles of tort law. The Government is under a duty to furnish medical services, hospitalization and nursing to servicemen (see *U. S. v. Standard Oil Co.*, 332 U. S. 301, p. 304 footnote 5, and p. 317, 91 L. Ed. 2067, 2070, 2076), and it would be liable under the law of Virginia, if it is treated as a private individual. In *Virginia Iron, etc. Co. v. Odle's Adm'r*, 128 Va. 280, 301; 105 S. E. 107, 114, the Court said:

"As to . . . where there is a 'personal contract to provide competent medical attention', the master is liable to the servant for injury resulting from the negligence or malpractice of the physician or surgeon employed by him, it is unnecessary to cite authority, as the proposition is elementary and undisputed."

And in *Stuart Circle Hospital Corp. v. Curry*, 173 Va. 136, 3 S.E. 2d 153, the hospital was held liable for the negligence of its staff.

The Government has nothing to fear. In the proper case it may avail itself of the defenses of fellow servant, volun-

tary assumption of risk and contributory negligence. The Comptroller General has already used the fellow servant doctrine to bar recovery under the Tort Claims Act for an accident that occurred at an army depot in Virginia. See Comp. Gen. Dec. B-77926, decided 14 October, 1948.

Nor would dire consequences follow in the case of a "battle commander's poor judgment, an Army surgeon's slip of hand, a defective jeep which causes injury \* \* \*" (*Brooks* case). The Act itself (28 USCA 943(a)) bars recovery for a battle commander's poor judgment (See *Denny v. U. S.*, 171 F. 2d 365, *supra*.) as well as for the surgeon's slip of hand or the injury caused by the defective jeep, if the claim arose out of combatant activities (28 USCA 943(j)). In these cases nonliability is determined by the specified activity rather than culpability.

Moreover, in cases not barred by the Act itself, the serviceman could recover only if he successfully overcame the defenses available to the Government under familiar rules of state law. In view of such protection, it is submitted, there is no valid reason why the claims of servicemen incident to their service should not be treated like other claims. Moreover, as was said in *Griggs v. U. S.*, 178 F. 2d 1, *supra*: "If the result of its omission to exempt such claims leads to dire consequences and absurd results, it is for Congress and not this Court to provide rational limitations".

The lower court in this case reasoned in its opinion that *military discipline* requires the exclusion of injuries incident to service from the coverage of the Act, expressing the fear that the military command would be subjected "to public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States," by reason of injuries caused by the negligence of a superior officer. In this particular case, of course, there was no finding that petitioner's injuries were caused by a superior officer, but instead it was found by the District Court that

the failure to remove the towel constituted "negligence on the part of agents or employees of the government at the hospital" (R. 21). Such agents or employees, of course, conceivably could have been civilians or persons of lesser rank than petitioner. And, in the *Griggs* case, the deceased held the rank of Lieutenant Colonel, which would seem to make inappropriate the reasoning adopted by the Fourth Circuit.

In any event, petitioner here does not feel that military discipline would be adversely affected by the allowance under the Act of claims incident to service. On the contrary, military personnel likely would be better disciplined, more willing to perform their duties, if they could be secure in the knowledge that the Government had accorded them the right to recover for injuries negligently inflicted upon them. The increasing tendency of Congress to bestow benefits of all kinds upon servicemen seems to support this view, as would the fact that the military forces in World War II were probably accorded more rights and more benefits than at any other time in the history of this country, with the result that such military forces were the best disciplined this country has ever produced.

Moreover, the Articles of War and the system of courts-martial are quite adequate to meet the needs of any occasion insofar as military discipline is concerned.

The Fourth Circuit expressed also the view that the civil courts would be required to pass upon the propriety of military decisions if recovery were permitted here. This position is untenable, for clearly no military decision was involved in the performance of surgery. See *Costley v. United States*, 181 F. 2d 723, *supra*.

Nor could there be any interference through the Tort Claims Act with the propriety of military decisions in any case because of exception (a) of the Tort Claims Act (*supra*



pp. 6) which, codifying the common law rule, clothes public officers with immunity while performing public duties involving the exercise of discretion. See *Dinsman v. Wilkes*, 12 How. 390, 403. Thus it is quite clear that the Government cannot be held liable under the doctrine of *respondeat superior* for military decisions whether or not a discretion has been abused.

There is also, we submit, no merit to the Fourth Circuit's proposition that application of the law of negligence in the several states would affect the government-soldier relationship. Purely of federal creation, that relationship is not changed by the state law of negligence. State law would determine the nature and extent of Government liability for the tortious acts of government employees, servicemen included, (see 28 USCA 941 (b)), but only with respect to a relationship between the Government and its employees as established by Congress.

The defense that the government-soldier relationship constitutes a bar to recovery for injuries incident to the service is the equivalent of an assertion that the Tort Claims Act does not apply to those cases wherein the negligence occurs during the exercise of any sovereign power of the United States, as distinguished from those of a proprietary nature. This defense, however, was considered and rejected by the United States District Court, N. D. California, S. D., in *Cerri v. United States*, 80 F. Supp. 831, where it was said (p. 833):

"The defense \* \* \*, if heeded, would create a twilight zone of governmental activities in which the consent given by this statute could not be applied. Too numerous are the affairs of a purely governmental or sovereign nature, prohibited to or not duplicated by the activities of private individuals, to consider this to be the intent of Congress. \* \* \*

"The phrase '\* \* \* where the United States, if a private person, would be liable \* \* \*', 28 USCA sec.

921. and sec. 931, is not to be understood to mean that the United States can be sued only if a private person can be sued under the identical circumstances. This phrase does not determine the relationship of the government to its employees, but rather determines the relationship of the government to third parties. *The act gives the consent of the United States to be treated by the injured party as if it were a private individual, amenable to court action without claim of immunity, in all those cases, not exempted by the act, where the negligence of its agents, servants or employees has caused injury or damage to third parties*" (italics supplied).

Petitioner here contends that for the purposes of his claim he occupies the position of a "third party", injured by reason of the negligence of governmental agents, servants or employees. The fact that a form of employer-employee relationship existed between petitioner and the government at the time of the injury complained of should constitute no greater obstacle to recovery here than it did in the *Brooks* case.

Finally, if by judicial fiat servicemen other than those on furlough are excluded from the benefits of the Tort Claims Act an outlandish result which Congress hardly could have intended would come to pass. Let us suppose that two soldiers, one on furlough and one engaged in military duty as a messenger, while standing together on a sidewalk at a street intersection are instantly killed when struck by an army truck negligently operated by another soldier acting within the scope of his employment. The legal representative of the soldier on duty would be entitled only to the six months' death gratuity of several hundred dollars, whereas the legal representative of the one on furlough would be entitled to receive the death gratuity and, let us suppose, \$25,000.00 under the Tort Claims Act (that was the amount recovered in the *Brooks*

case) from which the death gratuity would be deducted. Could Congress have intended such disparity in damages for the death of two servicemen due to negligence of another federal employee?

### Conclusion

The language of the Federal Tort Claims Act is clear, and the obvious intent of Congress is reflected by a literal interpretation of the Act. The Act was intended to be broad in scope, was designed to create new liabilities on the part of the Government.

As Mr. Justice Reed declared in *American Stevedores v. Porello*, 330 U. S. 446, 453, 91 L. Ed. 1011, 1018:

"The passage of the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act attests to the growing feeling of Congress that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or property damage."

In this setting, a congressional purpose to permit recovery by servicemen for injuries either incident to or wholly unconnected with their military service cannot be considered anomalous. On the contrary, such a purpose is entirely in conformity with the fundamental departures being made by Congress from long-standing policies of immunity.

Petitioner respectfully requests that the judgment of the lower court be reversed.

Respectfully submitted,

MORRIS ROSENBERG,

HENRY M. DECKER, JR.,

*Attorneys for Petitioner.*

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1950**

**ARTHUR E. JEFFERSON, PETITIONER**

**UNITED STATES OF AMERICA**

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**BRIEF FOR THE UNITED STATES**

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# **In the Supreme Court of the United States**

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**BRIEF FOR THE UNITED STATES**

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## **OPINIONS BELOW**

The two opinions of the district court (R. 4-16; 16-31) are reported at 74 F. Supp. 209 and 77 F. Supp. 706. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 41-45) is reported at 178 F. 2d 518.

## **JURISDICTION**

The judgment of the court of appeals was entered on December 19, 1949 (R. 45). A petition for a writ of certiorari was filed on February 18, 1950 and

granted on March 13 (R. 47). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether under the Federal Tort Claims Act a soldier, who, while on active duty and incident to his service, sustained personal injuries as a result of the negligence of other Army personnel, may recover damages for those injuries.

#### STATUTE INVOLVED

Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code [formerly Tort Claims Act] are set forth in the Appendix to the Brief for the United States in *United States v. Griggs*, No. 31, this Term.

#### STATEMENT

On July 31, 1947, petitioner instituted this suit against the United States under the Federal Tort Claims Act for personal injuries resulting from an allegedly negligent surgical operation performed on him by an Army surgeon at Fort Belvoir, Virginia. The gravamen of his complaint was that "while on active duty as a member of the Army of the United States, [he] was caused to undergo an abdominal operation at Fort Belvoir Hospital, Fort Belvoir, Virginia," which was negligently "performed by a surgeon of the United States Army Medical Corps on active duty" (R. 1).

On October 23, 1947, the district court overruled without prejudice a motion by the United States to dismiss the complaint on the ground that a "suit by a former member of the Military Forces to recover

damages allegedly caused by a negligent abdominal operation performed on the soldier \* \* \* by an Army surgeon in the State of Virginia \* \* \* while both were on active duty \* \* \* is not within the coverage of the [Federal Tort Claims] Act" (R. 4). The United States then filed an answer denying negligence on the part of the surgeon, and, as a separate defense, again alleged that the Federal Tort Claims Act does not authorize suit by military personnel or by former military personnel for injuries "caused by another member of the Armed Forces received by such person while a member of the Armed Forces" (R. 3).

After the trial, the district court found that the injuries were caused by the negligent abdominal operation performed on petitioner (R. 21); that he applied for and is receiving total disability benefit checks of \$138.00 monthly<sup>1</sup> from the United States for his injuries (R. 20); that he had received, as of April 30, 1948, the sum of \$3,645.50, and that, with an estimated life expectancy of 22 years, he would receive, under legislation then in effect, an additional \$31,947.00<sup>2</sup> from the United States (R. 20).

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<sup>1</sup> As required by recent legislation, this monthly payment was first increased to \$159.00 (in accordance with the Act of July 2, 1948, 62 Stat. 1219) and was later increased to \$171.00, effective December 1, 1949, as required by Public Law 339, 81st Cong., 1st sess.

<sup>2</sup> This computation was based on the \$138.00 monthly payment and did not take into account the fact that, as of September 1, 1948, the monthly payment was increased to \$159.00 and that, on December 1, 1949, it was further increased to \$171.00. See fn. 1, *supra*.  
~~increased to \$171.00. See fn. 1, *supra*.~~

The district court further stated that if plaintiff were entitled to recover at all under the Federal Tort Claims Act, these disability benefit payments must be treated in diminution of the amount of the verdict, and that the sum of \$7,500 would be an appropriate verdict (R. 21). However, since the district court concluded that as a matter of law, the Federal Tort Claims Act does not apply to soldiers' service-caused disabilities, the complaint was dismissed (R. 21, 31). The Court of Appeals for the Fourth Circuit affirmed (R. 41-45).

#### ARGUMENT

Like *United States v. Griggs* and *Feres v. United States* (Nos. 31 and 9, this Term), this case presents the question as to whether Congress intended the Federal Tort Claims Act to cover claims for the death or injury of a soldier, sustained incident to his military service and as a result of the negligence of other military personnel. The Brief for the United States in the *Griggs* case, No. 31, develops the reasons and authorities which, we submit, establish the correctness of the decision below in the instant case. In addition, the Brief for the United States in *Feres v. United States*, No. 9, undertakes to show that whether the soldier is injured or killed in service, allowing suit under the Federal Tort Claims Act would in either event subject military conduct to judicial review and thereby impair military discipline. Similarly, in the instant case, the

fact that petitioner is a discharged serviceman would in no way lessen that impairment.<sup>3</sup>

#### CONCLUSION

For the reasons set forth above and in the Brief for the United States in the *Griggs* case, No. 31, it is respectfully submitted that the judgment of the court below should be affirmed.

PHILIP B. PERLMAN,  
*Solicitor General.*

H. G. MORISON,  
*Assistant Attorney General.*

NEWELL A. CLAPP,  
*Special Assistant to the Attorney General.*

PAUL A. SWEENEY,  
MORTON HOLLANDER,  
*Attorneys.*

SEPTEMBER 1950

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<sup>3</sup> *Santana v. United States*, 175 F. 2d 320 (C.A. 1), relied on in the Petition for Writ of Certiorari, p. 17, concerned injuries sustained not by a soldier, but by a civilian. As petitioner recognizes, that case differs from "the instant case in that [there] the tort was committed after the veteran had been discharged from the service." *Ibid*.



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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1950**

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**No. 31**

**THE UNITED STATES OF AMERICA, PETITIONER**

**vs.**

**EDITH LOUISE GRIGGS, AS EXECUTRIX OF THE  
ESTATE OF DUDLEY R. GRIGGS, DECEASED**

---

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT**

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**PETITION FOR HABEAS CORPUS FILED MARCH 15, 1950**

**HABEAS CORPUS GRANTED MAY 9, 1950**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. \_\_\_\_\_

THE UNITED STATES OF AMERICA, PETITIONER

vs.

EDITH LOUISE GRIGGS, AS EXECUTRIX OF THE  
ESTATE OF DUDLEY R. GRIGGS, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

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1 In the United States Court of Appeals for the Tenth Circuit  
No. 3806

EDITH LOUISE GRIGGS AS EXECUTRIX OF THE ESTATE OF  
DUDLEY R. GRIGGS, DECEASED, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE

*Statement of points relied upon*

The appellant, Edith L. Griggs, as Executrix of the Estate of Dudley R. Griggs, deceased, in her appeal to the Circuit Court of Appeals described in Notice of Appeal intends to rely on appeal on the following points:

1. The District Court erred in granting the defendant's Motion to Dismiss and such order was contrary to the law.
2. The District Court erred in entering final order of September 8, 1948, dismissing this action and such order was contrary to law.

FREDERICK P. CRANSTON,

*One of the Attorneys for Appellant, Edith L. Griggs as  
Executrix of the Estate of Dudley R. Griggs, deceased.*

Received copy of above this 16 day of November 1948.

MAX M. BULKELEY,

*United States District Attorney.*

HENRY E. LUTZ,

*Assistant United States District Attorney,  
Attorney for Appellee.*

2 United States Court of Appeals

*Order re printing of record*

November 18, 1948

Thirty-eighth Day, September Term, Thursday, November 18th,  
A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge.

This cause came on to be heard on the motion of appellant to delay the printing of the record in this cause until thirty days after the Supreme Court of the United States has passed upon the petition for a writ of certiorari in the case of United States vs. Brooks, 169 F. 2d 841.

It appearing that the same issues are involved in this case as in the case of United States vs. Brooks, it is now here ordered that the printing of the record in this cause be delayed until thirty days after the Supreme Court of the United States has passed upon the case of United States vs. Brooks.

2 UNITED STATES VS. EDITH LOUISE GRIGGS, EXECUTRIX

3 In the District Court of the United States for the District  
of Colorado

Pleas and proceedings before The Honorable J. Foster Symes,  
Judge of the United States District Court for the District of  
Colorado, presiding in the following entitled cause:

EDITH LOUISE GRIGGS, AS EXECUTRIX OF THE ESTATE OF DUDLEY R.  
GRIGGS, DECEASED, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

No. 2448.-Civil

*Complaint*

Filed May 27, 1948

Comes now the plaintiff by her attorneys, Frederick P. Cranston  
and L. James Arthur, and for a claim against the defendant  
alleges:

1. This action is brought under authority of 28 U. S. Code  
Annotated, Sec. 931, Subsection (a), commonly known as the  
Tort Claims Act.

2. On May 17, 1948 plaintiff was appointed by the County Court  
of the City and County of Denver as Executrix of the Estate of  
Dudley R. Griggs, Deceased, and she is now the Executrix of such  
Estate, and the personal representative of decedent, Dudley R.  
Griggs.

3. Plaintiff is a resident of the District of Colorado, and Dud-  
ley R. Griggs at the time of his death, as hereinafter described,  
was a resident of the District of Colorado.

4. On or about November 30, 1947, Dudley R. Griggs was a Lt.  
Colonel in the Army of the United States, and was on active duty  
in such Army. On or about such date he was admitted under  
official orders to the Army Hospital at Scott Field Army  
Air Base, an institution under the exclusive control of the  
defendant, located in St. Clair County in the Eastern Dis-  
trict of Illinois, for the purpose of submitting to treatment and  
an operation, and he remained under the sole and exclusive control  
of the defendant until his death.

5. While at such hospital as aforesaid, Dudley R. Griggs, was  
placed under the care of certain employees of the Medical Corps  
of the United States Army, being Agents of the defendant, all of  
whom were in the employ and under the control of the defendant,  
which employees undertook to use reasonable diligence and skill  
as medical officers of the United States Army, authorized to prac-

tice anywhere in the world, which employees undertook the diagnosis of the malady and treatment therefor.

6. Between November 19, 1947 and December 18, 1947 in the State of Illinois, the defendant and its Agents negligently, carelessly and unskillfully performed certain acts and failed to give prompt and reasonable and skillful treatment, and by acts of negligence and carelessness failed to exercise the degree of care and skill prescribed by the Medical Branch of the United States Army, as a result of which death of Dudley R. Griggs occurred on December 18, 1947 in the City of St. Louis, Missouri.

7. The death of Dudley R. Griggs is a direct and proximate result of the carelessness, negligence and unskillfulness of the defendant and its Agents, all of whom were under the employ and direct control of defendant, and such death was caused by the negligent acts and omissions of one or more employees of defendant while acting within the scope of office and employment of such person or persons, and under circumstances where a private person would be liable for such death in accordance with the law of Illinois where the acts and omissions occurred, and were caused by the wrongful acts, neglect and defaults of officers and employees of the defendant.

8. The following extracts appearing in Smith-Hurd, Ill. Ann. Statutes, Ch. 70, at the times herein mentioned, were  
5 and they now are the law of Illinois:

#### SECTION 1. Action for Damages.

Be it enacted by the People of the State of Illinois represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

#### SECTION 2. Action By whom brought—Limit of Damages—Death outside State.

Every such action shall be brought by and in the names of the personal representatives of such deceased person and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just



4 UNITED STATES VS. EDITH LOUISE GRIGGS, EXECUTRIX

compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person not exceeding the sum of \$15,000: Provided, that every such action shall be commenced within one year after the death of such person. . Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.

6 9. The law of Illinois as interpreted by its Courts is to the effect that the last proviso of Section 2 hereinabove set forth, does not apply where death occurs outside of Illinois under circumstances where the wrongful act, neglect or default occurred in Illinois.

10. Dudley R. Griggs left surviving him the plaintiff, who is his widow, and Dudley R. Griggs, Jr., who is the son and only child of Dudley R. Griggs, of the age of sixteen years, the plaintiff and Dudley R. Griggs, Jr., being the only heirs and next of kin of Dudley R. Griggs, and this action is brought by the plaintiff for the exclusive benefit of herself and Dudley R. Griggs, Jr.

11. The plaintiff as Executrix and as widow, and Dudley R. Griggs, Jr. as his son, as a result of the foregoing, have sustained damages in the sum of Fifteen Thousand Dollars (\$15,000).

Wherefore Plaintiff prays judgment against defendant in the sum of \$15,000; for her costs in this action expended, and for such other and further relief as to the Court may seem proper.

FREDERICK P. CRANSTON,  
L. JAMES ARTHUR,  
*Attorneys for Plaintiff.*

Filed May 27, 1948.

In-United States District Court

*Motion of defendant for dismissal*

Filed July 26, 1948

Comes now the United States of America, the defendant above named, by the United States Attorney for the District of Colorado, and moves the court for the dismissal of this cause upon the grounds following:

1. That the complaint herein fails to state a claim upon which relief can be granted.

2. That it appears that all and singular the matters complained of were necessarily performed in the exercise of a discretionary function or duty on the part of the employees of the government so performing the same; and, accordingly,

the claim herein asserted is exempt from suit perforce Section 943, Title 28, United States Code.

MAX M. BULKELEY,  
*United States Attorney for the District of Colorado.*

HENRY E. LUTZ,  
*Assistant United States Attorney for the District of Colorado.*

Filed July 26, 1948.

IN UNITED STATES DISTRICT COURT

*Order of dismissal*

September 8, 1948

At this day comes the plaintiff by L. James Arthur, her attorney, and the defendant by Henry E. Lutz, Assistant District Attorney, also comes, and thereupon, on motion of the defendant:

It is ordered by the Court that the above-entitled action and complaint be, and the same is hereby dismissed out of this court, with prejudice.

Entered on the Docket September 8, 1948.

In United States District Court

*Notice of appeal*

Filed October 6, 1948

Notice is hereby given that Edith Louise Griggs as Executrix of the estate of Dudley R. Griggs, deceased, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the order dated September 8, 1948, granting the defendant's motion to dismiss and entering the final judgment dismissing this action.

FREDERICK P. CRANSTON,  
L. JAMES ARTHUR,  
*Attorneys for Plaintiff, Edith L. Griggs as Executrix of  
the Estate of Dudley R. Griggs, Deceased.*

8 Received copy of above this 6th day of October 1948.

HENRY E. LUTZ,  
*Asst. U. S. Atty.*

Filed October 6, 1948.

[A bond on appeal was filed October 6, 1948.]

[Clerk's certificate to foregoing transcript omitted in printing.]

9 In United States Court of Appeals, Tenth Circuit  
And thereafter the following proceedings were had in

said cause in the United States Court of Appeals for the Tenth Circuit:

Record Entry: Cause Argued and Submitted

First Day, September Term, Monday, September 12th, 1949. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel, Frederick P. Cranston, Esquire, appearing for appellant, Henry E. Lutz, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

10 In United States Court of Appeals

*Opinion*

November 16, 1949

Frederick P. Cranston (L. James Arthur was with him on the brief) for Appellant.

Henry E. Lutz, Assistant United States Attorney for the District of Colorado (Max Bulkeley, United States Attorney for the District of Colorado, was with him on the brief) for Appellee.

Before PHILLIPS, Chief Judge and HUXMAN and MURRAH, Circuit Judges.

MURRAH, Circuit Judge, delivered the opinion of the court.

By this appeal we are asked to decide a question directly presented and decided in *Jefferson v. United States*, 74 F. 11 Supp. 209, and 77 F. Supp. 706, and discussed but not decided in *Brooks v. United States*, 337 U. S. 49, namely, whether the United States is liable under the Federal Tort Claims Act, as amended, 28 U. S. C. A. Secs. 1346 (b), 2671-2680, for the death of a member of the armed forces on active, but not combat, duty, allegedly caused by the negligence of employees of the United States Government, while acting in the scope of their office or employment.

The facts are not in dispute. On or about November 20, 1947, Dudley R. Griggs, a Lt. Colonel on active duty in the United States Army, was admitted under official orders to the Army Hospital at Scott Field Air Base in the State of Illinois, for the purpose of surgery and treatment. Death occurred while under treatment and the widow, as executrix, brought this action against the United States in the United States District Court of Colorado, to recover damages for his wrongful death, allegedly caused by the negligent, careless and unskillful acts of members of the Army Medical Corps, while acting in the scope of their office or employment. The trial court sustained a motion to dismiss on the

grounds that the complaint did not state a claim on which relief could be granted under the Act, and entered judgment in favor of the United States.

The Federal Tort Claims Act, by its terms gives the United States District Courts exclusive jurisdiction of civil actions on claims against the United States on account of personal injuries caused by the negligent or wrongful acts of any employee of the United States, while acting within the scope of his office or employment, under circumstances where the United States as a private person would be liable to the claimant for such injuries in accordance with the law of the place where the act occurred.

In the Brooks case, the asserted claims against the United States, for injuries to one serviceman and death to another, arose while the soldiers were on furlough, and not in any way incident to their military service. The Supreme Court was not "persuaded" that the words "any claim" meant "any claim but that of servicemen", and therefore held the asserted claims within the coverage of the Act.<sup>1</sup> It did not reach the point suggested there, and present here, whether "an army surgeon's slip of hand, [or] a defective jeep which causes injury", would ground tort claims against the United States. It left for future consideration whether the omission of Congress to exclude claims for injuries or death incident to active service meant that it intended to include every such claim against the Government, or whether the results of such claims would be so "outlandish" or absurd as to put them outside the scope and purpose of the legislation, and hence justify a judicially imposed limitation, which the Congress omitted to provide.

Invoking familiar canons which sanction judicial construction of legislative words and phrases to comport with the obvious Congressional intent, Judge Chesnut, in the Jefferson case, pointed to the historical and unique Government-soldier relationship, and concluded that the obvious purpose of Congress was to exclude claims of soldiers arising out of that relationship from coverage of the Act. In referring to the nature of the Government-soldier relationship he pointed to the "large body of federal legislation" providing disability benefits to servicemen and gratuity payments to their survivors, as indicative of congressional intent. But the Supreme Court in the Brooks case was not moved by such considerations.

13 The terms of the statute are clear, and appellant's action for a money judgment based upon the negligence of army

<sup>1</sup> By the 1948 revision of the United States Code, the Federal Tort Claims Act was amended, and Section 931 which provided exclusive district court jurisdiction of "any claim against the United States" now provides exclusive jurisdiction "of civil actions on claims against the United States."

We do not regard the changed phraseology as indicating a congressional purpose to narrow the scope of jurisdiction under the Act. The Government does not so contend.

surgeons states a cause for relief under the Act, unless it falls within one of the twelve exceptions specifically provided therein; or, unless from the context of the Act it is manifestly plain that despite the literal import of the legislative words, Congress intended to exclude from coverage civil actions on claims arising out of a Government-soldier relationship.

Only two of the exceptions could be pertinent to our question. Subsection (a) excludes claims based upon the exercise or performance or the failure to exercise or perform a discretionary function, and subsection (j) exempts any claim arising out of the combatant activities of the armed forces. It is manifestly plain that the alleged acts of negligence, while involving skill and training, were nondiscretionary. Cf. *Denny v. United States*, 171 F. 2d 365. The claim arose after hostilities had ceased, and the Government makes no contention that it falls within exception (j).

With deference to the views of the learned judge, in the *Jefferson* case, we fail to find anything in the context of the Act or its legislative history justifying judicial limitation upon the claims of servicemen. As pointed out in the *Brooks* case, there were eighteen tort claims bills introduced in Congress between 1925 and 1935, all but two of which contained provisions expressly exempting claims of members of the armed forces. When, however, the Congress finally came to confer jurisdiction of the District Courts over tort claims against the United States, it conspicuously omitted to exclude claims growing out of a government-soldier relationship. We think the only logical conclusion is that it deliberately refrained from doing so. If the result of its omission to exempt such claims leads to dire consequences and absurd results, it is for Congress and not this Court to provide rational limitations.

14 We hold that the claim states a cause of action over which the court had jurisdiction, and the case is therefore reversed.  
**HUXMAN**, Circuit Judge, dissenting:

While the question is not free from doubt, I find myself unable to agree with the conclusions reached by my associates.

The precise question involved here was alluded to by the Supreme Court in *Brooks v. United States*, 337 U. S. 49, but an answer thereto was not necessary to the decision in that case. No doubt, the question ultimately will be answered by the Supreme Court when it is appropriately and necessarily raised in a case before that tribunal.

In *Jefferson v. United States*, 77 F. Supp. 706, Judge Chesnut, in an able and exhaustive opinion, reviewed the history of the Federal Tort Claims Act and reached the conclusion that it was not intended to cover service-connected injuries sustained by members of the Armed Forces while in such service. I subscribe to the



philosophy of the Jefferson case. I can add nothing of value to the logic or reasoning of that opinion. In the interest of brevity, I adopt the reasoning of the Jefferson case and make it the basis of this dissent.

15 In United States Court of Appeals

*Judgment*

November 16, 1949

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court.

On December 1, 1949, an order was entered extending the time for appellee's petition for rehearing to December 30, 1949.

18 In United States Court of Appeals

*Petition of the United States for rehearing*

Filed December 27, 1949

On November 16, 1949, this Court, with Judge Huxman dissenting, reversed the decision of the District Court of the District of Colorado and held that the Federal Tort Claims Act authorizes the entry of a judgment for damages for the death of an Army officer who was killed, allegedly through the negligence of other Army personnel, while on active duty and as an incident to his service. For the reasons set forth hereinafter, the United States urges this Court to grant a rehearing, to reconsider its holding, and to affirm the decision of the District Court.

GROUND'S OF PETITION

This petition is based mainly on our conviction that this Court has misconceived the clear implication of the language of the Supreme Court in *Brooks v. United States*, 337 U. S. 19 49. In Point I we discuss the *Brooks* case and two very recent decisions by the Court of Appeals for the Second Circuit and by the Court of Appeals for the Fourth Circuit. Those two decisions are in direct conflict with this Court's decision in the instant case. The Second and Fourth Circuits, in interpreting the implication of the Supreme Court's opinion in the *Brooks* case,

have unanimously ruled that an Army officer's service-incident injury or death is not compensable under the Federal Tort Claims Act. *Feres v. United States*. — F. 2d — (C. A. 2), decided November 4, 1949, see Appendix, *infra*, p. 19; *Jefferson v. United States*. — F. 2d — (C. A. 4), decided December 19, 1949, see Appendix, *infra*, p. 23. We also undertake in Point I to re-enforce our view by the circumstance that the Federal Tort Claims Act has supplanted the Military Claims Act under which a service-incident death was not compensable.

In Point II, we point out that a refusal to award appellant damages under the Federal Tort Claims Act for her husband's service-incident death does not leave her remediless, but that the United States, in fact, under other federal statutes, is already compensating her for that death.

## I

### BROOKS V. UNITED STATES, 337 U. S. 49 PRECLUDES RECOVERY OF DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT FOR AN ARMY OFFICER'S SERVICE-INCIDENT DEATH

#### A. THE OPINION OF THE SUPREME COURT IN *BROOKS V. UNITED STATES*,

337 U. S. 49

There is no doubt, as pointed out by this Court in the  
 20 opinion in the instant case, that the Supreme Court, in the Brooks case, did not decide the question as to whether the Federal Tort Claims Act covers a claim arising out of the service-incident death of a member of the armed forces on active duty. This Court's opinion also points out, however, that while that question was "not decided in *Brooks v. United States*," it certainly was "discussed" there by the Supreme Court, — F. 2d —. That discussion has a vital bearing on the question now here. Although the Supreme Court stated that "no opinion" was expressed as to the question now before this Court, the whole burden of its discussion and the clear implication to be drawn therefrom is that while servicemen's claims for injuries or death *not* incident to military service fall within the Act, the Act does not apply to claims for injuries or death incident to their military service.<sup>1</sup>

<sup>1</sup> Although Justices Frankfurter and Jackson dissented from the Supreme Court's opinion in the Brooks case, they obviously shared the majority's view that service-incident injuries are not compensable under the Federal Tort Claims Act. In noting their dissent, the two Justices expressly adopted the reasoning of Judge Doble's decision in the Court of Appeals (337 U. S. 49, 54). That decision, in turn, emphasizes the fact that there is "added and greater reason for denying recovery where the injury is service-caused (the Jefferson case) than where the injury is not service-caused (the Brooks case)." 169 F. 2d 840, 844. See *fn. 6, infra*, p. 8. In addition, it should be noted that Judge Doble joined in the recent unanimous decision by the Court of Appeals for the Fourth Circuit holding that Jefferson's service-incident injury is not compensable under the Federal Tort Claims Act. *Jefferson v. United States*. — F. 2d — (C. A. 4), decided December 19, 1949, see Appendix, *infra*, p. 23.

21 The reasoning of the Supreme Court in pointing out how it reached the conclusion in the Brooks case that it did permits no other conclusion. Thus, in presenting the question there decided, the Supreme Court stated (337 U. S. 49, 50): "The question is whether members of the United States armed forces can recover under that Act for injuries *not* incident to their service."<sup>2</sup> Then, after setting forth the facts which showed that the soldiers there involved were riding in their private automobile on a public highway when they were struck by a government vehicle, the Supreme Court stated (337 U. S. 49, 52):

"We are dealing with an accident which had nothing to do with Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, *a wholly different case would be presented.*"

In order to illustrate the "wholly different" case which would be presented under the Federal Tort Claims Act, the Supreme Court specifically referred to a tort action grounded on "an army surgeon's slip of hand" and then cited the decision handed down by District Judge Chesnut in *Jefferson v. United States*, 77 F. Supp. 706 (later affirmed by the Court of Appeals for the Fourth Circuit, see Appendix, *infra*, p. 23), together with two other decisions in which the Court of Appeals for the Second Circuit had decided that service-incident deaths of Naval personnel are not compensable under other federal statutes allowing suits on maritime claims arising out of tortious acts of government servants. *Dobson v. United States*, 27 F. 2d 807 (C. A. 2), certiorari denied, 278 U. S. 653, and *Bradey v. United States*, 151 F. 2d 742 (C. A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880.

After citing those cases, the Supreme Court stated that while they were not relevant to the actual case before it (i. e., a non-service-incident injury or death) and would not therefore be followed there, they would have relevance "in its context" (i. e., in a service-incident situation, such as was involved in the *Dobson*, *Bradey*, and *Jefferson* cases as well as in the instant case). The Supreme Court thus clearly indicated that those cases are squarely in point in the instant situation and should therefore, we submit, be followed here.<sup>3</sup>

23 More than case law was relied on by the Supreme Court in stressing the need for differentiating between service-

<sup>2</sup> Unless otherwise noted, the italics appearing in this petition have been supplied.

<sup>3</sup> The district court's opinion in the *Jefferson* case was discussed in both the majority and minority opinions of this Court. The Court of Appeals for the Fourth Circuit, on December 19, 1949, unanimously affirmed the district court holding that a soldier's service-incident injury, caused by alleged malpractice of an army surgeon, is not compensable under the Federal Tort Claims Act (*Jefferson v. United States*, — F. 2d —

incident and non-service-incident situations under the Federal Tort Claims Act. Thus, the Court noted the "similar distinction in 31 U. S. C. 223b." That statute, known as the Military Claims Act, authorizes the Secretary of the Army to settle claims of military personnel for injury or death caused by other military personnel *except* where the injury or death was incident to the claimant's military service. The Military Claims Act thus reflects the general congressional policy of limiting the claims of servicemen for injuries incident to their service to pensions or other veterans' disability benefits. In view of the nature of the statute and its exclusion of service-incident situations, the Supreme Court's reference to that statute, like the reference to the Dobson, Bradey and Jefferson cases, constitutes a clear indication that the same distinction must be adhered to under the Federal Tort Claims Act.

In still further stressing the need for that distinction, the Supreme Court pointed out that there were sound reasons for attributing to Congress an intent to recognize non-service-incident claims under the Federal Tort Claims Act and at the same time an intent "to leave injuries incident to service where they were." Leaving service-incident claims "where they were" is, of course, another way of saying that, since they were not recognized  
 24 by Congress in the Military Claims Act nor by the courts in the Dobson and Bradey cases,<sup>4</sup> they should not be considered actionable under the Federal Tort Claims Act.

The reasoning underlying the Supreme Court's distinction between the service-incident-injury situation presented by the instant case and the non-service-incident-injury in the Brooks

(C. A. 4), see Appendix, *infra*, p. 23). The other two cases cited by the Supreme Court, i. e., the Dobson and Bradey cases, also involved factual situations peculiarly similar to those presented by the instant case. In both of those cases, servicemen lost their lives as an incident of their naval service and due to the negligence of other naval personnel. And, in both cases, the Court of Appeals for the Second Circuit, in unanimous opinions which the Supreme Court refused to review on petitions for certiorari, ruled that, despite the absence of any express exclusionary provision in the Public Vessels Act, that Act did not authorize a recovery against the United States for the death of a member of the armed forces incurred incident to his service. *Dobson v. United States*, 27 F. 2d 807 (C. A. 2), certiorari denied, 278 U. S. 653, and *Bradey v. United States*, 151 F. 2d 742 (C. A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880.

<sup>4</sup> All of the cases involving service-incident claims under other federal legislation authorizing suits against the United States are in accord with the Dobson and Bradey cases. Thus, in the period of federal control of the railroads during World War I, the Director General of the Railroads was subjected to liability in suits for personal injury and death to the same extent that the railroad carrier would have been liable in the absence of federal control. Act of March 21, 1918 (40 Stat. 451, 456). These suits, instituted against the Director General, were held to be suits against the United States (*Missouri Pacific Railroad Co. et al. v. Ault*, 256 U. S. 554, 561; *Dahn v. Davis*, 258 U. S. 421, 428; 32 Opinions Attorney General 531, 535 (1921)). While the Railroad Control Act did not expressly exclude claims based on the death or injury of a member of the armed forces incurred incident to his military service, the courts to which the question was presented uniformly held that the Act did not authorize recovery on such claims. *Seidel v. Director General of Railroads* (149 La. 414, 89 So. 308) held that a sailor could not recover, under the Act, for personal injuries sustained while in line of duty. Again, in *Moon v. Hines*, Director General of Railroads (205 Ala. 355, 87 So. 603), the court sustained a judgment for defendant in a suit by a soldier for personal injuries sustained while travelling on a railroad in the course of his official duty. See, to the same effect, *Bryson v. Hines*, 268 Fed. 290 (C. A. 4); *Sandoval v. Davis*, 288 Fed. 56 (C. A. 6); and cf. *Possey v. T. V. A.*, 93 F. 2d 726 (C. A. 5). See also *Goldstein v. New York*, 281 N. Y. 396, 24 N. E. 2d 97.



case, is apparent. In the Brooks case, the soldiers were "on leave or furlough engaged in their private concerns and not on any business connected with their military service" (United States v. Brooks, 169 F. 2d 840, 841 (C. A. 4)). They were not on the highway, where they were hit by the Government car, because of their being soldiers. The accident, out of which their claims under the Act arose, was not caused by their military service, nor did any of their military responsibilities, assignments, or activities have any relationship with the accident. In fact, since they were on leave, it is obvious that no military requirement had directed them to be on that highway or in the car involved in the accident. They were, at that time, on their own and voluntarily spending their leave in the manner they had selected for their own personal convenience.<sup>5</sup>

In sharp contrast are the facts of the instant case: Here there was no leave or furlough. It was only because Lt. Colonel Griggs was a soldier on active duty that he was operated on by an Army doctor on an Army operating table in an Army hospital, where the alleged negligence occurred.<sup>6</sup> His being on active duty in the Armed Forces required him to submit to that operation by an Army surgeon only because of the military relationship between the two of them. Had he refused medical or surgical treatment considered "necessary to enable [him] to perform properly his military duties" he would have been guilty of a

<sup>5</sup> The Supreme Court has stated that while on leave, a serviceman "is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses." *United States v. Williamson*, 23 Wall. 411, 415. The leave "is a favor extended for his sole accommodation" to permit him to "enjoy a respite from military duty." *Foster v. United States*, 43 C. Cls. 170. "A leave of absence or a furlough is a favor extended. A soldier cannot have a furlough forced on him." *Hunt v. United States*, 38 C. Cls. 704, 710.

<sup>6</sup> When the Brooks case was first before the Court of Appeals for the Fourth Circuit, both the majority and minority opinions stressed the difference between the non-service-incident-injury in the Brooks case and the service-incident-injury in the Jefferson case. Thus, Judge Doble stated (169 F. 2d 840, 844-845):

"There is a clear factual distinction between the Jefferson case and the case before us (i. e., the Brooks case). There the injury was service-caused since the claim was based on the negligence of an army surgeon while performing a surgical operation on the soldier. With us, the injuries were service-connected though not service-caused; for, at the time of the accident, appellees were on furlough or leave, riding in their privately owned automobile. Counsel for appellees, relying heavily on this factual distinction between the two cases, contend that the Jefferson decision does not control the instant case.

"We readily admit the added and greater reason for denying recovery where the injury is service-caused (the Jefferson case) than where the injury is not service-caused (the present case). It is easy to conjure up the unfortunate results, including the subversion of military discipline, if soldiers could sue the United States for injuries incurred by reason of their being in the armed service of their country. If soldiers could sue for such injuries as illness based on the alleged negligence of the company cook or mess sergeant, or if soldiers who contract sickness on wintry sentry duty had a right of action against the Government on the allegation of a negligent order given by the company commander, then the traditional grumbling of the American soldier would result in the devastation of military discipline and morale."

And Chief Judge Parker, in dissenting, pointed out (169 F. 2d 840, 850):

"It should be noted that the claims in suit here [i. e., the Brooks case] do not arise out of injuries connected with the military service of plaintiffs, as was the case in *Jefferson v. United States*, 77 F. Supp. 706. Entirely different considerations might operate to deny recovery in such case, as is suggested in the opinion of Judge Chesnut." These views were reiterated even more forcefully by the Court of Appeals for the Fourth Circuit in its unanimous holding in the Jefferson case. See Appendix, *infra*, p. 22.



breach of military discipline and subject to trial by court martial. AR 600-10, Sec. (e) (9). In the absence of his military obligations and in the absence of his active duty status the particular negligence now complained of would not have taken place. As appellant herself emphasizes in the complaint it was while her husband "was on active duty" as a "Lt. Colonel in the Army of the United States" that "official orders" directed him to the "Army Hospital at Scott Field Army Air Base \* \* \* for the purpose of submitting to treatment and operation" (R. 3-4).

Since the death here involved was sustained not while the Army officer was on leave,<sup>7</sup> but as a direct incident of his military service, we submit that the instant case calls for application of that part of the Brooks case which would preclude the recovery of damages under the Federal Tort Claims Act for service-incident deaths.

Any other conclusion would, as observed by the Court of Appeals for the Fourth Circuit in the Jefferson case, impair "essential military discipline":

"\* \* \* It seems unreasonable, however, to conclude that Congress \* \* \* intended \* \* \* to subject every injury sustained by a member of the armed forces in the execution of military orders to the examination of a court of justice if the injured person should make the claim that his injury was caused by the negligence of a superior officer. If this were so, the civil courts would be required to pass upon the propriety of military decisions and actions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States. We think this consideration too weighty to be swept aside by adverting to the exceptions relating to military personnel which were contained in bills submitted to Congress when the matter was under examination. When a statute is subjected to the interpretation of the courts, too much weight should not be given to the language contained in discarded or to the statements of legislators in the course of debate. *Order of Conductors v. Swan*, 329 U. S. 520, 529. *Jewell Ridge Corp. v. Local*, 325 U. S. 161, 168. (See Appendix, *infra*, p. 27)."

<sup>7</sup> Decisions of the Judge Advocate General make it clear that the damages sustained by a serviceman will be deemed "not incident to his service," where, as in the Brooks case, and unlike the instant case, the serviceman was on authorized leave or pass at the time of the accident. JAG Bulletin, vol. 3, pp. 155, 427 (1944). However, where an officer reported to an Army hospital for treatment and claimed damages for his clothing which had been damaged at the hospital, the Judge Advocate General ruled that the damages occurred incident to the officer's service and that the claim must therefore be disallowed under the Act of July 3, 1943, as amended, 57 Stat. 372, 31 U. S. C. 223b. JAG Bulletin, vol. 3, p. 67 (1944).

**B. THE COURT OF APPEALS FOR THE SECOND CIRCUIT, IN FERES V. UNITED STATES, AND THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IN JEFFERSON V. UNITED STATES, HAVE ALREADY DECIDED THAT A SERVICE-INCIDENT INJURY OR DEATH IS NOT ACTIONABLE UNDER THE FEDERAL TORT CLAIMS ACT**

At the time the decision in the instant case was handed down by this Court it did not have before it the November 4, 1949, decision of the Court of Appeals for the Second Circuit in *Feres v. United States*, — F. 2d —, on the precise question now here. That decision is set forth in full in the Appendix, *infra*, p. 19. Moreover, on December 19, 1949, the Court of Appeals for the Fourth Circuit also handed down its decision in *Jefferson v. United States*, — F. 2d —, on the precise question now here. That decision is also set forth in full in the Appendix, *infra*, p. 23.

The *Feres* case, like this one, involved the death of an officer of the armed forces where such death was incident to his military service and caused by the negligence of other military personnel. There, too, it was contended that the Federal Tort Claims Act embraced such claims. The Court of Appeals for the Second Circuit in a unanimous opinion rejected that contention and after quoting from the Supreme Court's opinion of the *Brooks* case, observed that there was—

“no reason for not adhering to the view we took as to damage claims of military personnel in *Dobson v. United States*, *supra*, and *Bradey v. United States*, *supra*, and that which Judge Chesnut took in *Jefferson v. United States*, 77 F. Supp. 706, now on appeal in the Fourth Circuit. If more than the pension system had been contemplated to recompense soldiers engaged in military service we think that Congress would not have left such relief to be implied from the general terms of the Tort Claims Act, but would have specifically provided for it. The only exception to this interpretation of the statute which seems to have been recognized by the Supreme Court in the *Brooks* case applied to situations where military personnel were not on active duty.” (See Appendix, *infra*, p. 22.)

Similarly, in the *Jefferson* case, where a soldier sued for personal injuries resulting from an operation performed on him by an Army surgeon at an Army hospital, the Court of Appeals for the Fourth Circuit unanimously held that a soldier may not recover for service-incident injuries even though he may recover for nonservice incident injuries.

The *Jefferson* and *Feres* cases recognize the need for distinguishing between service-incident and non-service-incident claims as stressed by the Supreme Court's opinion in the *Brooks* case.

Those two cases give full effect to the Brooks' opinion's clear implication that service-incident claims are not actionable under the Federal Tort Claims Act, and should, we submit, be followed here.

**C. CONSTRUING THE FEDERAL TORT CLAIMS ACT IN THE LIGHT OF THE MILITARY CLAIMS ACT WHICH IT SUPPLANTED, CONFIRMS THE VIEW THAT CONGRESS INTENDED TO EXCLUDE SERVICE-INCIDENT INJURIES AND DEATHS FROM THE FEDERAL TORT CLAIMS ACT.**

The Military Claims Act (31 U. S. C. 223b), as noted *supra*, p. 6, authorizes the Secretary of the Army to settle claims of military personnel for injury or death caused by other Army personnel except where the injury or death occurred incident to the soldier-claimant's military service.<sup>8</sup> The instant claim, arising out of a service-incident situation, would not have been cognizable under that Act. Section 424a of the Federal Tort Claims Act (60 Stat. 846) repealed the Military Claims Act insofar as it covered matters otherwise cognizable under the Federal Tort

Claims Act.<sup>9</sup> That repeal certainly was not intended to make cognizable under the Federal Tort Claims Act claims which had theretofore never been recognized under the repealed statute. To the contrary, application of the well-established rule that a new or substitute statute must be interpreted in light of the enactment which it supplanted, fortifies the conclusion that the Federal Tort Claims Act, just like its predecessor Military Claims Act, does not include claims by servicemen for injury or death sustained by them incident to their military service and as a result of the negligence of other military personnel. See *Samson v. United States*, 79 F. Supp. 406, 408 (S. D. N. Y.); see *Jefferson v. United States*, 77 F. Supp. 706, 715 (D. C., Md.).

## II

**EVEN THOUGH APPELLANT IS NOT ENTITLED TO RECOVER DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT, SHE IS ENTITLED TO FULL BENEFITS AND PAYMENTS FROM THE UNITED STATES UNDER THE APPROPRIATE MILITARY AND VETERANS' BENEFIT LAWS**

For the reasons set forth above, we submit that the district court properly refused to award appellant damages under the Federal Tort Claims Act for the death of her husband incurred incident to his service and as a result of the negligence of other military personnel. That does not mean, however, that the United States, under other statutes and regulations, is not com-

<sup>8</sup> A similar statute confers identical authority upon the Secretary of Navy with respect to torts of naval personnel. 31 U. S. C. 223d.

<sup>9</sup> It also repealed the Navy statute referred to in the preceding footnote.

pensating appellant for her financial loss. She is still entitled to the full benefits and payments under the appropriate military and veterans' benefit laws. In fact, as stated in the letter from the Veterans' Administration, reprinted in the Appendix 32 (infra, p. 28), appellant, in the two year period since her husband's death, has already received from the United States, on account of the death of her husband in service, pension payments in excess of \$2,100. It is also estimated that she will receive future similar payments aggregating an additional \$18,000.<sup>10</sup> Moreover, as stated in a letter from the Department of the Army (Appendix, infra, p. 30), appellant has also been paid, because of the death of her husband in service, the sum of \$2,695, representing the six months' death gratuity under the Act of December 17, 1919, as amended, 41 Stat. 367, 57 Stat. 599, 10 U. S. C. 903.<sup>11</sup>

It is significant to note that these payments under the military and veterans' laws total an expected amount in excess of \$22,000. This figure must be compared with the \$15,000 limitation imposed by Illinois law on recoveries in wrongful death actions. Act 33 of July 18, 1947, Laws of Illinois, 1947 (p. 1094).<sup>12</sup> As pointed out by appellant in her complaint, that limitation is applicable to the instant suit under the Federal Tort Claims Act (R. 5, 6). Thus, even if there were liability here on the part of the United States under the Federal Tort Claims Act, that liability could not exceed the sum of \$15,000 diminished by the value of past and prospective payments made by the United States to appellant under the military and veterans' laws on account of the same death which forms the basis of the instant action. *United States v. Brooks*, 176 F. 2d 482 (C. A. 4).<sup>13</sup> Since the payments under the military and veterans' law are expected to exceed the \$15,000 maximum recoverable, there would thus be no recovery of damages in the instant case even if service-incident deaths were held to be compensable under the Federal Tort Claims Act.

Furthermore, in connection with these payments, it is important to note that the availability of workmen's compensation benefits would prevent a civilian from maintaining the instant actions.

<sup>10</sup> This estimate is based upon the receipt of a \$75 monthly payment over an expected life span of 20 years for a 55 year old woman (U. S. Life Tables and Actuarial Tables 1939-1941, Thomas N. E. Greville, Government Printing Office, 1946, p. 37; and see letter from Veterans' Administration, infra, p. 28, stating that appellant was 53 years of age when her husband died in December, 1947 (R. 4)). The estimate also assumes that the appellant will not remarry; and thus become ineligible for monthly payments.

<sup>11</sup> In addition, appellant is the beneficiary of a \$10,000 United States Government Life Insurance Policy, the proceeds of which are now being paid by the United States to appellant because of the death of her husband. (Appendix, infra, p. 29.)

<sup>12</sup> This Act amended the Illinois Injuries Act, Illinois Revised Statutes, chapter 70, so as to increase the maximum liability in a wrongful death action from \$10,000 to \$15,000, effective July 18, 1947. *Monroe v. Chase*, 76 F. Supp. 278 (E. D. Ill.).

<sup>13</sup> This decision, dealing with the question of diminution of damages, was handed down by the Court of Appeals for the Fourth Circuit on remand of the *Brooks* case from the Supreme Court.



The above-described payments made to appellant under the military and veterans' laws are identical to workmen's compensation benefits. In fact, the statutory system developed for the care of servicemen and their dependents, and pursuant to which the above-described payments to appellant are being made, contain all of the essential features of workmen's compensation laws applicable to persons disabled or killed in private industry.

34 Both statutory schemes provide for compensation without requiring any proof of fault. In private industry, the disability itself, coupled with the employment relationship, justifies the award. Similarly, for servicemen, the disability or death and the military relationship, support the pension and other Federal payments. Just as the provisions for the workmen's compensation benefits relieve the private employer from any further liability for the death or injury to his employees even though the injured employee might obtain a far greater recovery by suit if he could establish the employer's negligence, the analogous and more generous benefits available to servicemen and their dependents for injuries or deaths incurred incident to their service should, we submit, relieve the United States of any additional liability. Limiting the private employee to workmen's compensation benefits cannot be viewed as discriminating against him even though a third party suffering the same damages through the negligence of the same employer would have access to court action against the employer. Restricting the servicemen to the analogous and more generous benefits of the military and veteran laws similarly cannot be viewed as discriminatory. In both instances, relief for injury or death is not subject to the uncertainties, expense and delay of establishing negligence but is guaranteed through direct administrative payments.

### 35 CONCLUSION

For the above reasons it is respectfully urged that rehearing be granted herein and that the judgment of the district court be affirmed.

H. G. MORISON,  
*Assistant Attorney General,*

MAX M. BULKELEY,  
*United States Attorney,*

HENRY E. LUTZ,  
*Assistant United States Attorney,*

PAUL A. SWEENEY,  
MASSILLON M. HEUSER,  
MORTON HOLLANDER,

*Attorneys,  
Department of Justice.*



CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

MAX M. BULKELEY,  
*United States Attorney.*

DECEMBER 1949.

36

APPENDIX

1. DECISION IN FERES v. UNITED STATES

United States Court of Appeals for the Second Circuit

(Argued October 10, 1949. Decided November 4, 1949.)

BERNICE B. FERES AS EXECUTRIX UNDER THE LAST WILL AND  
TESTAMENT OF RUDOLPH J. FERES, DECEASED, PLAINTIFF-  
APPELLANT

v.

THE UNITED STATES, DEFENDANT-APPELLEE

Before AUGUSTUS N. HAND, CHASE, and FRANK, Circuit Judges.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NORTHERN  
DISTRICT OF NEW YORK

From an order dismissing the above-entitled action brought under the Federal Tort Claims Act, the plaintiff appeals. Affirmed.

AUGUSTUS N. HAND, Circuit Judge: This is an appeal from an order dismissing an action brought by the executrix under the will of Rudolph J. Feres, deceased, against the United States to recover damages under the Federal Tort Claims Act. The decedent, an army lieutenant, while on active duty in the service of the United States, was killed by fire in a barracks in Pine Camp, New York, a military post of the United States in which he had been required to be quartered by superior officers.

37 The complainant alleged negligence on the part of the officers who required the deceased to be quartered in barracks which they knew or should have known to be unsafe due to a defective heating plant and further negligence on the part of the fire guard assigned to the area in which the fire occurred and of the supervisors of the latter. Judge Brennan dismissed the complaint on the authority of *United States v. Brooks*, 169 F. 2d 840. That decision was by a divided court in the Fourth Circuit. The majority, in an opinion by Judge Dobie, in which Judge Watkins

concurred, held that there could be no recovery on behalf of two soldiers who while on furlough and taking a pleasure drive suffered death and personal injury, respectively, through collision with an army truck. Judge Parker dissented on the ground that the language of the statute allowed suits by soldiers. The majority relied on the analogy to the decisions in this court refusing to allow naval personnel to recover damages under the Public Vessels Act. *Dobson v. United States*, 27 F. 2d 807, cert. den. 278 U. S. 653; *Bradey v. United States*, 151 F. 2d 742, 743, cert. den. 326 U. S. 795, rehearing den. 328 U. S. 880.

The Supreme Court reversed the Court of Appeals for the Fourth Circuit in an opinion by Justice Murphy [*Brooks v. United States*, 337 U. S. 49], from which Justices Frankfurter and Douglas dissented. The majority allowed recovery on the ground that the "accident to the soldiers had nothing to do with the Brooks' army careers," and added (at page 52) "were the accident due to the Brooks' service a wholly different case would be presented.

We express no opinion as to it, but we may note that only in its context do *Dobson v. United States*, 27 F. 2d 807, *Bradey v. United*

38 States, 151 F. 2d 742, and *Jefferson v. United States*, 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U. S. C. § 223 b."

The Tort Claims Act provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances. \* \* \*", 28 U. S. C. 2674.

39 There are twelve exceptions to the Act,<sup>1</sup> but they relate to cause of injury rather than to the character of a claimant who may seek to recover damages for his injuries. While

#### <sup>1</sup> 28 U. S. C. 2680. EXCEPTIONS.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

they relieve the government in certain situations from liability to all persons including civilians, they do not mention soldiers specifically. There would seem to have been no reason for mentioning soldiers when the latter had not been treated as having claims for injuries incident to their service. See 31 U. S. C. § 223 b.

In the circumstances we see no reason for not adhering to the view we took as to damage claims of military personnel in *Dobson v. United States*, supra, and *Bradey v. United States*, supra, and that which Judge Chesnut took in *Jefferson v. United States*, 77 F. Supp. 706, now on appeal in the Fourth Circuit. If more than the pension system had been contemplated to recompense soldiers engaged in military service we think that Congress would not have left such relief to be implied from the general terms of the Tort Claims Act, but would have specifically provided for it. The only exception to this interpretation of the statute which seems to have been recognized by the Supreme Court in the *Brooks* case applied to situations where military personnel were not on active duty.

It might be thought that our conclusion is somewhat weakened by the fact that when the Tort Claims Act was introduced in Congress, H. R. 181, 79th Cong., 1st Sess., it contained a thirteenth exception, making the Act inapplicable to "Any claim for which compensation is provided by the Federal Employees Compensation Act, as amended, or by the World War Veterans' Act of 1924, as amended." This exception was omitted in the Act as finally passed. However, the Federal Employees Compensation Act, as amended, provided that as long as an employee is in receipt of compensation under that Act "he shall not receive from the United States any salary, pay or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States \* \* \*" 5 U. S. C. A. § 759. And the World War Veterans' Act of 1924, as amended, provided that "no other pension laws or laws providing for gratuities or payments in the event of death in the service" shall be applicable to disabilities or deaths made compensable under the Act. Consequently, it would seem that the explanation for the omission of the thirteenth exception to the Tort Claims Act is that it was considered unnecessary. We do not, therefore, consider this omission sufficiently significant to require a result contrary to that we have reached.

For the foregoing reasons the order should be affirmed.

2. DECISION IN JEFFERSON V. UNITED STATES

United States Court of Appeals for the Fourth Circuit

ARTHUR K. JEFFERSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE, CIVIL

(Reargued November 8, 1949. Decided December 19, 1949)

Before PARKER, SOPER, and DOBIE, Circuit Judges.

SOPER, Circuit Judge:

41 This suit was brought by a member of the armed forces of the United States under the Federal Tort Claims Act, 28 U. S. C. A. § 2674 et seq., to recover for personal injuries resulting from a surgical operation performed by an army surgeon at Fort Belvoir, Virginia. It was found by Judge Chesnut at the trial in the District Court, 77 F. Supp. 706, that a towel used during an operation had been left in a surgical wound through the negligence of government employees at the hospital, and in consequence the plaintiff had suffered serious injuries for which \$7,500 would be an appropriate verdict if the case were tenable. The judge held, however, that the statute was not intended to cover claims by members of the armed forces of the United States for service-connected injuries suffered while in the service. He therefore dismissed the case on motion of the United States and this appeal followed.

In the meantime the Supreme Court, upon an appeal from this court, rendered its decision in *Brooks v. United States*, 337 U. S. 49, in which it held that two soldiers riding in their own automobile while on leave were entitled to recover for injuries received when they were struck by a United States Army truck driven by a civilian employee of the Army. That decision established that members of the armed forces of the United States can recover under the Federal Tort Claims Act for injuries not incident to their service, but left open the question whether the statute also covers claims by servicemen for injuries incident to their service. The court said (pp. 52-53):

"The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States.



42 But we are dealing with an accident which had nothing to do with the Brook's army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do *Dobson v. United States*, 27 F. 2d 807, *Bradey v. United States*, 151 F. 2d 742, and *Jefferson v. United States*, 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U. S. C. L223b. Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U. S. 198. The Government fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us.

Since this decision was rendered, the question not decided by the Supreme Court has been considered in the Second and Tenth Circuits which came to opposite conclusions. In *Feres, Ex'r v. United States*, 2 Cir., decided Nov. 4, 1949, it was held that the estate of an army officer killed in a fire in unsafe army barracks in which he had been quartered through the negligence of superior officers was not entitled to recovery for his death; but in *Griggs, Ex'r v. United States*, 10 Cir., November 16, 1949, it was held that the estate of an army officer could recover under the act for his wrongful death caused by the negligence of members of the Army Medical Corps while he was under medical treatment.

43 The Second Circuit based its decision largely upon the provision which Congress has made for military persons in the form of disability payments and pensions. The Tenth Circuit found more persuasive the broad language of the statute and the fact that Congress failed to except connected injuries of military personnel although bills containing such exceptions had been presented for its consideration.

We are in accord with the conclusions reached by the Second Circuit. The choice lies between a literal interpretation of the Act and a construction which recognizes the peculiar relationship that exists between a member of the armed services and superior military authority. Congress was plainly impressed with the large number of justified complaints on the part of persons injured through the negligence of employees engaged in the manifold activities of the federal government, and found it desirable to modify the government immunity from suit and to give relief to injured persons through the procedure of the courts rather than



through private statutes which burdened the legislative branch of the government and caused delay in the consideration of complaints. Hence the Federal Tort Claims Act was passed. It seems unreasonable, however, to conclude that Congress, while accomplishing these desirable purposes, intended at the same time to subject every injury sustained by a member of the armed forces in the execution of military orders to the examination of a court of justice if the injured person should make the claim that his injury was caused by the negligence of a superior officer. If this were so, the civil courts would be required to pass upon the propriety of military decisions and actions and essential military

discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States. We think this consideration too weighty to be swept aside by adverting to the exceptions relating to military personnel which were contained in bills submitted to Congress when the matter was under examination. When a statute is subjected to the interpretation of the courts, too much weight should not be given to the language contained in discarded or to the statements of legislators in the course of debate. *Order of Conductors v. Swan*, 329 U. S. 520, 529. *Jewell Ridge Corp. v. Local*, 325 U. S. 161, 168.

This conclusion is fortified by the considerations enumerated and relied on in the opinion of Judge Chesnut and take that of the Second Circuit in the *Feres* case. The distinctively federal character of the government-soldier relationship is recognized in *United States v. Standard Oil Co.*, 322 U. S. 301, 305, where the extent to which state law may govern the relationship between military personnel and persons outside the military establishment was contrasted with the complete subjection to federal authority of the relationship between persons in the military service and the government itself. That state law governs in suits under the Federal Tort Claims Act is shown by the provision that the United States is liable for injuries caused by the negligence of a government employee acting within the scope of his employment under circumstances where a private person would be liable to the claimant under the law of the place where the act of omission occurred, but it is not reasonable to support, in the absence of an express declaration on the point, that Congress intended to adopt so radical a departure from its historic policy as to subject internal relationships within the military establishment to the law of negligence as laid down by the courts of the several states.

The service man is not left without protection by the interpretation of the statute, for as pointed out in the opinion of the

District Court, 76 Fed. Supp. 711, Note 1, Congress has long had in mind the peculiar dangers to which the military man is exposed, and has accordingly made elaborate provisions for pay and allowances and retirement benefits for persons in the Army and the Navy, in addition to medical and hospital treatment, which are always available. An analogous situation in suits by seamen against the United States under the Public Vessels Act led the court to decide that the permission granted to persons to libel the United States in personam for damages caused by the negligent handling of a public vessel refers to damages suffered by third persons but not by members of the ship's company. *Dobson v. United States*, 2 Cir., 27 F. 2d 807; *Bradey v. United States*, 2 Cir., 151, F. 2d 742.

Affirmed.

## 2. LETTER FROM THE VETERANS' ADMINISTRATION

### VETERANS' ADMINISTRATION

WASHINGTON 25, D. C.

Office of Solicitor.

Your file reference:

In reply refer to: 2 BR XC-6,264,905—Griggs, Dudley Robley.

Mr. H. G. MORISON,

*Assistant Attorney General, Claims Division,*

*Department of Justice, Washington 25, D. C.*

DEAR MR. MORISON: Pursuant to your recent request for information concerning payment of benefits to Edith Louise Griggs under veterans' laws, this is to advise that the records of the Veterans' Administration reflect the following payments:

### PENSION OR DEATH COMPENSATION

A total amount of \$2,155.20 has been paid to Edith Louise Griggs, as unmarried widow with one minor child, to and including the month of November 1949, at which time the monthly payments were \$100. Effective December 1, 1949, monthly payments were increased to \$105, pursuant to Public Law 339, 81st Congress. However, on January 11, 1950, the child will reach an age at which entitlement to benefits will cease, under present law, and the widow's monthly payments will be reduced to \$75. Payments of death compensation are to continue during the lifetime of the widow while she remains unmarried.

26 UNITED STATES VS. EDITH LOUISE GRIGGS, EXECUTRIX

INSURANCE

Under United States Government (Converted) Insurance, Policy No. K-1,200,611, issued to Dudley R. Griggs, a total amount of \$1,257.60 has been paid to Edith Louise Griggs, as beneficiary, through the month of November 1949, in installments of \$52.40 per month, effective December 18, 1947. Payments under this policy to continue during the lifetime of the widow (240 months certain). The widow was 53 years of age at the time of death of Dudley R. Griggs.

Very truly yours,

(S) Edward E. Odom,  
EDWARD E. ODOM,  
*Solicitor.*

47 3. LETTER FROM THE DEPARTMENT OF THE ARMY

DEPARTMENT OF THE ARMY  
OFFICE OF THE CHIEF OF FINANCE

WASHINGTON 25, D. C.

Your file reference: 157-13-7.

DECEMBER 21, 1949.

CSACF-E1 201 Griggs, Dudley R., O-193589.

Mr. H. GRAHAM MORISON,  
*Assistant Attorney General,  
Claims Division, Department of Justice.*

DEAR SIR: In compliance with your telephone request the following information is furnished: six months' death gratuity in the case of Dudley R. Griggs, Lieutenant Colonel O-193589, was paid to Edith L. Griggs designated widow, 1961 Kearney Street, Denver 7, Colorado, 12 January 48 in the amount of \$2,695 on Voucher No. 70186-4 account of S. H. Smith, Lieutenant Colonel, FD, symbol 210-684.

Sincerely yours,

JOHN PALSROK,  
*Major, FD, Asst. Rec. & Disb. Div.*

[File endorsement omitted.]

48 In United States Court of Appeals

*Order denying petition for rehearing*

January 9, 1950

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

In United States Court of Appeals

*Order staying mandate*

January 14, 1950

On January 14, 1950, an order of the United States Court of Appeals was entered staying the mandate of the said court for a period of thirty days under provision of paragraph 3 of rule 28 of said court.

49 [Clerk's certificate to foregoing transcript omitted in printing.]

## Supreme Court of the United States

*Order allowing certiorari*

Filed May 8, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary docket and assigned for argument following *Feres*, as *Executrix vs. United States of America*, and *Jefferson vs. United States of America*, Nos. 558 and 667 which are also transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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CHARLES ELMORE DROPLEY  
CLERK

No. 31

**In the Supreme Court of the United States**

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

EDITH LOUISE GRIGGS, AS EXECUTRIX OF THE ESTATE  
OF DUDLEY H. GRIGGS, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
TENTH CIRCUIT

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1949

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No. —

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH LOUISE GRIGGS, AS EXECUTRIX OF THE ESTATE  
OF DUDLEY R. GRIGGS, DECEASED

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
TENTH CIRCUIT

---

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on November 16, 1949.

## **OPINIONS BELOW**

The opinion of the District Court (R. 5) is not reported. The opinion of the United States Court of Appeals for the Tenth Circuit (R. 6-9) is reported at 178 F. 2d 1.

## **JURISDICTION**

The judgment of the Court of Appeals was entered on November 16, 1949 (R. 9). A petition for

rehearing was denied on January 9, 1950 (R. 26-27). The jurisdiction of this Court is invoked under 28 U. S. C. 1254-(1).

#### QUESTION PRESENTED

Whether the dependents of a member of the armed forces may recover damages, under the Federal Tort Claims Act, for his death which was incident to his military service, and occurred as a result of the negligence of other military personnel.

#### STATUTE INVOLVED

Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code [formerly the provisions of the Federal Tort Claims Act],<sup>1</sup> are set forth in the Appendix, *infra*, pp. 6-9.

#### STATEMENT

Edith Louise Griggs, the respondent herein, brought the instant suit as executrix of the estate of Dudley R. Griggs, deceased, to recover damages under the Federal Tort Claims Act for the wrongful death of her husband. Her complaint alleged that on November 30, 1947, her husband, who then "was on active duty" as a "Lieutenant

<sup>1</sup> Since the revision and codification of Title 28 of the United States Code, which was enacted into law by the Act of June 25, 1948 (Public Law 773, 80th Congress, 2d session), became effective September 1, 1948, the new code citations are used throughout this petition, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Federal Tort Claims Act. The rights of litigants in pending suits, under the former law, are, of course, preserved (Section 2(b) of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.), but the revision does not appear to have changed the applicable law in any respect which is here material.

Colonel in the Army of the United States," was directed by "official orders" to report to the "Army Hospital at Scott Field Army Air Base. \* \* \* for the purpose of submitting to treatment and an operation" (R. 2). The complaint further alleged that he died while undergoing this treatment as a result of the negligence of the Army Medical Corps members who treated him (R. 3).

The District Court sustained the motion of the United States to dismiss on the ground that the complaint did not state a claim on which relief could be granted under the Federal Tort Claims Act (R. 5). The Court of Appeals for the Tenth Circuit reversed, with Circuit Judge Huxman dissenting (R. 6-9).

#### REASONS FOR GRANTING THE WRIT

The issue presented by this case, in common with *Feres v. United States*, 177 F. 2d 535 (C. A. 2) (petition for a writ of certiorari, No. 558, this Term, granted on March 13, 1950), *Ostrander v. United States*, 178 F. 2d 923 (C. A. 2), and *Jefferson v. United States*, 178 F. 2d 518 (C. A. 4) (petition for a writ of certiorari, No. 381 Misc., this Term, granted on March 13, 1950), is whether an injury or death sustained by a member of the armed forces incident to his military service is compensable under the Federal Tort Claims Act. In *Brooks v. United States*, 337 U. S. 49, this Court held that recovery can be had under the Federal Tort Claims Act for injuries to, or death of, a serviceman not incident to his service. Al-



though we believe that a fair reading of that opinion (pp. 52-3) indicates that the Court was inclined toward the view that recovery could not be had where the injury was incident to the service, the disposition of that question was specifically reserved. The court below has held that recovery may be had in the service-incident situation.<sup>2</sup> The Second Circuit in the *Feres* (see R. 19-21) and *Ostrander* cases, and the Fourth Circuit in the *Jefferson* case (see R. 22-25), have held that it may not.

In the *Jefferson* case, the Fourth Circuit expressly recognized the conflict in the circuits by observing that "the question not decided by the Supreme Court [in the *Brooks* case] has been considered in the Second and Tenth Circuits [i.e., in the *Feres* and *Griggs* cases, respectively] which came to opposite conclusions," and then itself went into conflict with the opinion of the Tenth Circuit in the instant case by stating that its views "accord with the conclusions reached by the Second Circuit." *Jefferson v. United States*, 178 F. 2d 518, 519 (see R. 23-4).

In view of the importance of the question, the frequency with which the issue arises, and the direct conflict among the circuits, we filed memoranda stating that we were not opposed to the granting of the petitions for writs of certiorari in the *Feres* and *Jefferson* cases. For the same reasons,

<sup>2</sup> In *Brooks*, the Court specifically refers to injuries resulting from "an army surgeon's slip of hand" as incident to military service. 337 U.S. at 52.

review of the instant decision is warranted.

CONCLUSION

It is respectfully submitted, therefore, that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,  
*Solicitor General.*

MARCH 1950.

## APPENDIX

Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code, provide:

§ 1346. United States as defendant.

\* \* \* \* \*

(b) Subject to the provisions of chapter 173 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

\* \* \* \* \*

§ 1402. United States as defendant.

\* \* \* \* \*

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

## § 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

## § 2680. Exceptions.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.



(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1950**

**UNITED STATES OF AMERICA,**

**Petitioner**

**EDYNE LOUISE GRIGGS, AS EXECUTRIX OF THE ESTATE  
OF DUDLEY G. GRIGGS, DECEASED**

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

**PRAYER FOR THE UNITED STATES**

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U. S. Life Tables and Actuarial Tables 1939-1941, Thomas N. E. Greville, Govt. Printing Off., 1948, p. 37	38

# In the Supreme Court of the United States

OCTOBER TERM, 1950

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No. 31

UNITED STATES OF AMERICA,

*Petitioner*

*v.*

EDITH LOUISE GRIGGS, AS EXECUTRIX OF THE ESTATE  
OF DUDLEY R. GRIGGS, DECEASED

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF FOR THE UNITED STATES

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## OPINIONS BELOW

The order of the district court (R. 5) is not reported. The opinion of the United States Court of Appeals for the Tenth Circuit (R. 6-9) is reported at 178 F.2d 1.

## JURISDICTION

The judgment of the court of appeals was entered on November 16, 1949 (R. 9). A petition for re-

hearing was denied on January 9, 1950 (R. 26-27). The petition for a writ of certiorari was filed on March 16, 1950, and was granted on May 8, (R. 29). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

#### QUESTION PRESENTED

Whether damages may be recovered under the Federal Tort Claims Act for the death of a member of the armed forces, where the death was incident to his military service and caused by the alleged negligence of other military personnel.

#### STATUTE INVOLVED

Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code [formerly the provisions of the Federal Tort Claims Act],<sup>1</sup> are set forth in the Appendix, *infra*, pp. 40-43.

#### STATEMENT

Respondent Griggs brought this suit against the United States in the United States District Court for the District of Colorado to recover damages under the Federal Tort Claims Act for the wrong-

<sup>1</sup> The Act of June 25, 1948, repealed the Federal Tort Claims Act, but re-enacted all of its provisions into the codification of Title 28, which took effect September 1, 1948 (62 Stat. 683, 862). The new code citations are accordingly used throughout this brief, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Federal Tort Claims Act. The rights of litigants in pending suits, under the former law, are, of course, preserved (62 Stat. 683, 862), but the revision does not appear to have changed the applicable law in any respect which is here material.

ful death of her husband (R. 2). Her complaint alleged that on November 30, 1947, her husband, who then "was on active duty" as a "Lieutenant Colonel in the Army of the United States," was directed by "official orders" to report to the "Army Hospital at Scott Field Army Air Base, \* \* \* Illinois, for the purpose of submitting to treatment and an operation" (R. 2). The complaint further alleged that he died while undergoing this treatment as a result of the negligence of the Army Medical Corps members who treated him (R. 3).

The district court sustained the motion of the United States to dismiss on the ground that the complaint did not state a claim on which relief could be granted under the Federal Tort Claims Act (R. 5). The Court of Appeals for the Tenth Circuit reversed, with Circuit Judge Huxman dissenting (R. 6-9). A petition for rehearing in which the court of appeals' attention was specifically directed to the then recent opinions in *Feres v. United States* and *Jefferson v. United States* (R. 9-26) was denied without comment (R. 27).

#### SUMMARY OF ARGUMENT •

### I

1. This case and its companion cases (Nos. 9 and 29) involve the specific question left open by this Court in *Brooks v. United States*, 337 U. S. 49, i. e., whether recovery against the United States may be had under the Federal Tort Claims Act for death or

injury incident to the service of a member of the armed forces.

The *Brooks* opinion impliedly recognized that a service-incident injury was a valid exception to this Court's holding in that case. The "wholly different case" involving a service-caused injury context which this Court differentiated so prominently in the *Brooks* case is now presented. There is ample basis within the framework of the *Brooks* opinion to deny recovery under the Tort Claims Act on a service-caused claim, while granting recovery in a non-service-incident context. The distinction also finds justification in (1) the need for avoiding application of state laws to military matters, (2) the desirability of avoiding judicial review of military orders, and (3) the postulate that military discipline must not be impaired.

2. The court below should have recognized and followed the doctrine enunciated by the Court of Appeals for the Second Circuit in *Dobson v. United States*, 27 F. 2d 807, certiorari denied, 278 U. S. 653, and *Bradey v. United States*, 151 F. 2d 742, certiorari denied, 326 U. S. 795, to the effect that the Public Vessels Act does not apply to service-caused claims despite the fact that that Act contains broad language and does not expressly exclude such claims. Those cases were recognized by this Court as controlling in a service-incident injury context such as is here presented. Various other cases in-



volving other and similar laws have denied recovery in like contexts.

## II

A. The broad language of the Federal Tort Claims Act cannot be properly interpreted without giving consideration to the consequences of reading the Act to include service-caused claims, and the consequences which would follow such an interpretation are so disturbing as to make it clear that Congress did not intend to include such claims therein. Thus, one consequence of including such claims within the Act would be the subjection of the government-soldier relationship to the dissimilar and varying state laws, a departure from the well-established rule that incidents of the government-soldier relationship must be determined by federal authority.

Another serious consequence that would follow such an interpretation is that it would subject the government-soldier relationship to judicial scrutiny, and thereby impair military discipline. It is a postulate that a well-disciplined military organization shall be self-regulating. To allow soldiers access to the courts in connection with injuries sustained by them while acting under military orders would be to vest in the courts the power to pass upon the propriety of military decisions. In the case at bar, the deceased officer was submitting to military orders in taking treatment. Had he refused the

treatment he would have been guilty of a breach of military discipline. Consequently, judicial review of the treatment or need for the treatment would be judicial review of a military decision. Instances of members of the armed forces being injured while carrying out military orders may be multiplied, and the threat to military discipline would be a serious one if judicial scrutiny were permitted to follow each incident.

B. The Military Claims Act (31 U. S. C. 223b), which was repealed by the Federal Tort Claims Act, did not permit the allowance of claims for injury if such claims were service-caused. The instant claim, arising out of a service incident, would not therefore have been allowable under that Act. The repeal of that Act should not be interpreted as making cognizable under the Tort Claims Act service-caused claims not recognized by the repealed Act.

C. The Federal Tort Claims Act authorizes administrative adjustment of tort claims not exceeding \$1,000. 28 U. S. C. 2672. This provision has received a uniform administrative construction by both the Army and Navy Departments which excludes service-incident claims from the coverage of the Act. 32 C. F. R. (1949 Ed.) 536.29 (1) (12) and 750.3(c)(1). This consistent administrative construction is reasonable and is entitled to great weight. It should not, therefore, be lightly overturned.

## III

The statutory scheme embodied in the Federal Tort Claims Act is unsuited to deal with service-caused claims. The United States made itself liable in tort only under the doctrine of *respondent superior*. Thus, the United States becomes liable only if the negligent employee would have become personally liable for his act.

It has long been the established rule that a soldier, in an action instituted by another soldier, may not be held personally liable for his negligence occurring in the course of their military service. This rule was long recognized and followed at common law and has been regularly acknowledged in the United States. The considerations underlying this rule are the impairments to military discipline which would result from judicial intrusion into the government-soldier relationship. It follows that under that rule the army surgeon charged with carelessness in the case at bar could not have been held personally liable for his alleged negligence, and the doctrine of *respondent superior*, upon which the Tort Claims Act is founded, prohibits the imposition of derivative liability upon the United States under that Act in this case.

## IV

The reversal of the judgment of the court below does not leave respondent unprotected. She is entitled under the appropriate military and veterans'

benefit laws to pension and other payments estimated to aggregate an amount in excess of \$22,000, which would have to be compared with and charged proportionately against the \$15,000 maximum recovery permitted by the law of Illinois for wrongful death. Thus, it is not clear that respondent would be entitled to receive a benefit from this suit in any event. Exclusion of service-caused claims from the Tort Claims Act will, therefore, work no apparent hardship on respondent.

#### ARGUMENT

This case and its companion cases, *Feres v. United States*, No. 9 this Term, and *Jefferson v. United States*, No. 29, this Term, involve the question specifically left open by this Court in *Brooks v. United States*, 337 U. S. 49—namely, whether recovery may be had against the United States in a suit brought under the Federal Tort Claims Act for an injury to or death of a member of the armed forces incident to his service. While the courts below in all of these cases recognized that the *Brooks* decision specifically left this question open, each court drew support from that opinion to establish its view. The majority of the court below adhered strictly to the first five paragraphs of the *Brooks* opinion and declined to follow or explore the other considerations set forth in the remainder of the opinion. The Courts of Appeals for the Second and Fourth Circuits in the *Feres* and *Jefferson* cases, respectively, treated the first five paragraphs

of the *Brooks* opinion as applying exclusively to the right to recover for an injury *not* incident to the service and, following the applicable rules of statutory interpretation suggested in the remainder of the *Brooks* opinion as well as drawing upon other pertinent material, concluded that the Federal Tort Claims Act did not permit recovery for injuries incident to the service. We submit that the approach taken by the majority of the court below in the instant case led to an erroneous conclusion, and that the course followed by the Courts of Appeals for the Second and Fourth Circuits led to the correct result.

# I

## **The Clear Implication of the *Brooks* Opinion, Especially When Considered in the Light of the Cases of Which It Spoke With Approval, Is That No Recovery May Be Had under the Federal Tort Claims Act for an Injury or Death Incident to the Service**

1. *The Brooks opinion impliedly recognized a service-incident injury as being a valid exception to the Court's holding in that case.* In the *Brooks* case, 337 U. S. 49, 50, this Court stated "The question is whether members of the United States armed forces can recover under that [the Federal Tort Claims] Act for injuries not incident to their service." It answered that question in the affirmative (*id.*, p. 51). The Court, however, was careful to point out that that case dealt "with an accident that had nothing to do with Brooks' army careers,



\* \* \*” and that “Were the accident incident to the Brooks’ service, a wholly different case would be presented” (*id.*, p. 52). And in commenting upon the “wholly different case,” this Court specifically referred to a tort action grounded on a “battle commander’s poor judgment, an army surgeon’s slip of hand, a defective jeep,” and cited *Jefferson v. United States*, 77 F. Supp. 706 (D. Md.), *Dobson v. United States*, 27 F. 2d 867 (C.A. 2), and *Bradley v. United States*, 151 F. 2d 742 (C.A. 2), as illustrative (*id.*, p. 52)—all of which cases, like the instant case, involved service-caused injuries or deaths.

The factual situation here provides precisely the “wholly different case” involving the incident-to-service injury contemplated by this Court’s opinion in the *Brooks* case. This is clearly borne out by a comparison of the facts in the two cases:

(1) In the *Brooks* case, the soldiers were riding in a private automobile on a public highway when they were struck by a government vehicle driven by a civilian employee. They were “on leave or furlough, engaged in their private concerns and not on any business connected with their military service” (*United States v. Brooks*, 169 F. 2d 840, 841 (C.A. 4). They were not on the highway, where they were hit by the government car, because of their being soldiers. The accident, out of which their claims under the Act arose, was not caused by their military service, nor did any of their military responsi-

bilities, assignments, or activities have any relationship to the accident. Since they were on leave, no military requirement had directed them to be on that highway or in the car involved in the accident. They were, at that time, on their own and voluntarily spending their leave in the manner they had selected for their own personal convenience.<sup>2</sup>

(2) In the instant case, there was no leave or furlough. It was only because Lt. Colonel Griggs was on active duty that he was operated on by an Army doctor on an Army operating table in an Army hospital, where the alleged negligence occurred. Because he was then on active duty in the military service, any refusal on his part to submit to Army medical or surgical treatment considered "necessary to enable [him] to perform properly his military duties" would have constituted a breach of military discipline, punishable by court martial. AR 600-10, Sec. 2(e) (9). His submission to the Army operation, and any negligence on the part of other Army personnel in the course of that operation, therefore, was not only incident to his service but a direct result thereof.

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<sup>2</sup> A serviceman "is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses." *United States v. Williamson*, 23 Wall. 411, 415. The leave is a favor extended "for his sole accommodation" to permit him to enjoy "a respite from military duty." *Foster v. United States*, 43 C. Cls. 170, 175. "A leave of absence or a furlough is a favor extended. A soldier can not have a furlough forced upon him." *Hunt v. United States*, 38 C. Cls. 704, 710.

It is clear, therefore, that there is present in the instant case the precise factual distinction which this Court stressed in the *Brooks* case by pointing out numerous circumstances and factors which seemed, instinctively, to raise formidable doubts that recovery would be proper should that factual difference exist.<sup>3</sup> Hence, there is, we submit, not only cogent suggestion but also ample basis within the framework of the *Brooks* opinion, for withholding recovery in the instant case where the alleged injury was incident to the service in every respect, while permitting recovery in a case, such as the *Brooks* case, involving non-service-incident injuries.

The service-incident injury distinction was regarded as critically significant by Judge Parker in his dissent from the Court of Appeals' first opinion in the *Brooks* case (169 F. 2d 846-850), with which dissent the majority of this Court stated its agreement (337 U. S. at p. 51). That dissent was, in fact, based on Judge Parker's understanding that a different result, i.e., one prohibiting recovery under the Act, would be required if the claim had arisen "out of injuries connected with the military service of plaintiffs, as was the case in *Jefferson v. United States*, 77 F. Supp. 706." See 169 F. 2d 840, 850. Judge Parker's continued adherence to this distinction is evidenced by his concurrence in the

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<sup>3</sup> Significantly, one of the circumstances pointed out by this Court was the fact that the service-incident distinction appeared in the Military Claims Act (31 U.S.C. 223b) which was repealed by the Tort Claims Act.

unanimous opinion of the Court of Appeals for the Fourth Circuit, in denying recovery in *Jefferson v. United States* (R. 22-25) on the ground that the plaintiff's injuries were caused by his military service.

Moreover, the distinction finds ample justification for its recognition in the need for avoiding the application of varying state laws in adjudicating service-caused claims, in the desirability of avoiding judicial review of service-caused claims arising as a result of the execution of military commands, and in the postulate that effective military discipline must not be impaired. Each of these considerations is significant and is fully applicable to situations involving service-caused injuries. They are of no consequence where the injuries, like those in the *Brooks* case, were caused during plaintiff's free time when he had all of the essential attributes of a private citizen rather than those of a soldier in the military service, and secondly, where the injuries were caused not by another soldier but by a civilian.

2. *The majority of the court below should have recognized and applied the service-incident injury doctrine in this case.* The service-incident distinction has been recognized and held in numerous instances as being a valid ground for barring recovery under other statutes, regardless of the fact that the particular statute involved contained no express provision either including or excluding its application.

In its opinion declining to apply the service-incident injury doctrine in the instant case, the court below makes no reference to *Dobson v. United States*, 27 F. 2d 807 (C.A. 2), certiorari denied, 278 U. S. 653, or to *Bradey v. United States*, 151 F. 2d 742 (C.A. 2), certiorari denied, 326 U. S. 795, rehearing denied, 328 U. S. 880, although both cases were strongly urged upon it. Those cases arose under the Public Vessels Act (43 Stat. 112, 46 U.S.C. 781), which authorizes the institution of *in personam* suits against the United States for damages caused by the employees of its public vessels. And, in both cases, the Court of Appeals for the Second Circuit unanimously ruled that despite the absence of any express exclusionary provision in the Public Vessels Act, that Act did not authorize a recovery against the United States for the death of a member of the armed forces incurred incident to his service:

In the *Brooks* case, this Court pointed out that the *Dobson* and *Bradey* cases, while not pertinent in a situation where the serviceman was injured while on furlough, would have relevance if the accident had occurred incident to the soldier's military service (337 U. S. 49, 52).

In the *Dobson* case, libels were filed under the Public Vessels Act by the legal representatives of deceased naval officers who, while on duty in the naval service aboard the United States submarine S-51, had lost their lives incident to their service when the submarine collided with another vessel on



the high seas and sank. It was alleged that the submarine was unseaworthy in that proper navigational lights were not displayed and that this defect caused the collision and consequent loss of lives without contributory fault on the part of the officers. On exceptions filed by the United States, the libels were dismissed. The Court of Appeals for the Second Circuit, in affirming the dismissal of the libels, held (1) that the imposition of liability on the United States for the death of a sailor sustained incident to his service involved too radical a departure from the Government's long-standing policy with respect to the personnel of its naval forces and therefore could not be accepted, and (2) that Congress, notwithstanding its authorization of wrongful death actions against the United States under the Public Vessels Act, meant to leave upon servicemen the same risks of injuries suffered in the service of the United States as they had before. Judge Swan, speaking for a unanimous court, stated (27 F. 2d 808, 809):

Verbally, there is nothing [in the Public Vessels Act] which excludes liability for damage to property or person of officers or crew.

\* \* \*

Nevertheless the construction contended for by appellants involves so radical a departure from the government's long-standing policy with respect to the personnel of its naval forces that we cannot believe the act should be given such a meaning. The statute itself does not specify who may maintain suits under it. To

allow suit by the officers and crew of the public vessel for damage caused by it to them would be too great a reversal of policy to be enacted by such general terms. The Act of October 6, 1917 (40 Stat. 389, [34 USCA ss 981, 982]) directs the Paymaster General of the Navy to reimburse officers, enlisted men, and others in the naval service \* \* \*.

Chapter 3, title 38, of the United States Code (38 USCA ss 151-206) provides an elaborate pension system for personal injury and loss of life incurred by officers and enlisted men in the navy. These pensions may be thought an inadequate substitute for the recovery of full damages under the Public Vessels Act of March 3, 1925, but they were well known to all who entered the naval service. \* \* \* If it had been the purpose to change that policy as respects officers and seamen of the navy injured by the unseaworthiness of a public vessel, or by the fault of one another, because that is what in the end it comes to, we cannot think it would have been left to such general language as is to be found in the above-quoted section P. \* \* \*

\* \* \* \* \*

We believe that Congress meant to leave upon the members of the naval forces the same risks of injuries suffered in the service of the United States as they had before. \* \* \*

Similarly, in the *Bradey* case a libel was filed by the legal representatives of a sailor, who died in 1944 as a result of injuries sustained while on duty

in the fireroom of the Navy destroyer upon which he had been serving. The district court's dismissal of this libel was again unanimously affirmed by the Court of Appeals, relying on its earlier decision in the *Dobson* case.

The need for considering the *Dobson* and *Bradey* cases in construing the Federal Tort Claims Act in the instant case is thus evident, and the fact that those decisions were made in the service-incident context so prominently pointed out by this Court in the *Brooks* case, and now presented in the case at bar, makes it abundantly clear that the doctrine of those cases should have been applied by the court below in this case.

Cases arising under other statutes waiving governmental immunity from tort suits, and holding that a serviceman may not recover for personal injuries sustained incident to his service, are in accord with the *Dobson* and *Bradey* cases. See *Seidel v. Director General of Railroads*, 149 La. 414, 89 So. 308; *Moon v. Hines, Director General of Railroads*, 205 Ala. 355, 87 So. 603; *Sandoval v. Davis*, 288 Fed. 56 (C. A. 6); see also *Goldstein v. New York*, 281 N. Y. 396, 24 N. E. 2d 97.<sup>4</sup>

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<sup>4</sup> In the *Goldstein* case, a private in the service of the State militia was killed in the line of duty as a result of the negligence of another serviceman. A wrongful death suit was brought against the State under the New York Tort Claims Act (Laws of New York, 1920, c. 922, sec. 12; Laws of New York, 1939, c. 860, sec. 8), in which the State, like the federal government under the Federal Tort Claims Act, had waived its immunity from liability for the torts of its employees. Even though the New York Act, like its federal counterpart and like the Public Vessels Act involved in the *Dobson* and *Bradey* cases, did not expressly exclude actions based on the

In each of these cases, the courts were faced with the identical problem presented in the court below and now here. All involved service-caused claims of members of the armed forces, or their representatives, under statutes waiving governmental immunity from tort suits. There, as here, the claimants strongly urged that the broad language of the statutes, and the failure to exclude expressly service-caused claims, required that they be recognized under those acts. But, for the reasons indicated, no such mechanical result was per-

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death of a serviceman incident to his service, the New York Court of Appeals dismissed the action and stated (281 N. Y. 396, 403):

"The question still remains whether the State has waived its immunity from liability to members of the militia and obligated itself to respond in damages for injuries negligently inflicted in active service by one member of the militia upon another and has granted to the Court of Claims authority to determine such liability and award a judgment for money damages therefor.

"The statement that the State may be made liable in damages to a soldier or his dependents, because of injuries inflicted upon him through the negligence of a brother soldier or officer, except as provided in the Military Law, is rather startling. We think that the general understanding has always been that for injuries suffered by a soldier in active service the government makes provision by way of a pension. That this State has done in the Military Law (§§ 220-224), wherein it is provided when an allowance may be made, for what it may be made, the procedure to be followed and the amount that may be allowed. In fact, a complete system is set up for handling such claims. To justify a decision that another concurrent remedy has been created whereby the State may be made liable in unlimited amounts requires a statute to that effect, the meaning and intent of which is unmistakable."

For additional New York holdings in accord with the *Goldstein* case, see *Kennedy v. New York*, 16 N.Y. Supp. (2d) 288; *McAuliffe v. New York*, 107 Misc. 553, 176 N.Y. Supp. 679. See, also, *Dembrod v. New York*, 185 Misc. 1061, 58 N.Y. Supp. (2d) 490.

mitted in any of those cases. Nor was there, we submit, any justification for the majority of the court below to ignore those cases and allow such a mechanical result in this case.

## II

### **The Federal Tort Claims Act Was Not Intended by Congress to Apply to Claims by Servicemen for Injuries or Deaths Incident to Their Service**

The Federal Tort Claims Act does not, in terms, either include or exclude claims for the death or injury of a member of the armed forces, sustained incident to his military or naval service and as a result of the negligence of other members of those forces in carrying out their duties. Certain broad language of the Act, coupled with the fact that claims of this character are not specifically excluded, is seized upon by respondent in the case at bar as sufficient basis for the assertion of such a claim. But it is obvious that the broad language of the Act cannot properly be interpreted without giving consideration to the consequences of reading the Act, as respondent does, to permit servicemen to sue for service-incident claims. See *United States v. American Trucking Associations, Inc.*, 310 U. S. 534, 543; *Boston Sand Co. v. United States*, 278 U. S. 41, 48; *United States v. Dickerson*, 310 U. S. 554, 561. In fact, with respect to the very issue presented by this case, this Court has admonished that interpretation of the broad language of the Federal Tort Claims Act must



take into account the consequences resulting from such an interpretation, "for those consequences may provide insight for determination of congressional purpose." *Brooks v. United States*, 337 U. S. 49, 52. Especially significant are two such consequences: (1) the subjection of the unique relationship between the United States and its soldiers to the varying laws of the different states, and (2) judicial intrusion into the realm of military and naval affairs.<sup>5</sup> In our view, these consequences point decisively to a congressional intent to exclude from the Act claims of military

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<sup>5</sup> A third possible consequence is also worthy of consideration. Congress expressly excluded from the Tort Claims Act (28 U.S.C. 2860(d), *infra*, p. 42) claims for which there is a remedy under the Suits in Admiralty Act (46 U.S.C. 741-752) or the Public Vessels Act (46 U.S.C. 781-790), i.e., admiralty claims against the Government. However, as we have pointed out, *supra*, pp. 14-19, the *Dobson* and *Bradley* cases hold that service-caused claims are not within the purview of those Acts. If service-caused claims are within the coverage of the Tort Claims Act, that Act would seem to include the admiralty claims excluded from the Suits in Admiralty and the Public Vessels Acts by those cases. Otherwise, the Tort Claims Act would work a discrimination against members of the naval forces and the marines, since it would permit recovery for service-caused injuries occurring on land but deny recovery for those occurring on board ship. If, on the other hand, that Act includes service-caused claims occurring both on land and on board ship, then it causes a division of admiralty claims, preserving for a part of them the traditional federal admiralty procedure and subjecting the remainder to adjudication under varying state laws. It seems most unlikely that Congress would desire to work such a discrimination, and it is even less likely that it would, while expressly excepting a part of the admiralty claims from the Act, tacitly create a remedy for the remainder which would make them subject to state laws. We believe it would be unreasonable to impute to Congress an intention to do either in the absence of language indicating that it had one of the novel purposes in mind.

or naval personnel for injuries or deaths caused by their service. This view is strongly supported by the fact that the Federal Tort Claims Act supplanted the Military Claims Act which itself expressly precluded recovery for service-incident injuries or deaths, and accords with the contemporary administrative construction.

*A. Allowing Suits on Service-Caused Injury or Death Claims Would Lead to Consequences Which Congress Should Not Be Presumed to Have Intended.*

1. *It would subject the government-soldier relationship to dissimilar state laws.* What is involved here is a claim advanced against the United States on behalf of one soldier for damages sustained in active service as a result of the negligence of other military personnel. It is a claim arising directly out of, and only by virtue of, the government-soldier relationship. In determining the rights or liabilities growing out of this unique government-soldier relationship, it is well established that the United States cannot be subjected to the force of dissimilar and frequently irreconcilable state statutes and decisions. Even where the interference with the government-soldier relationship was caused not by a soldier but by a party outside of the military establishment, this Court has observed (*United States v. Standard Oil Co.*, 332 U. S. 301, 305-306, 310):

Perhaps no relation between the Government and a citizen is more distinctively fed-

eral in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, *the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.* See *Tarble's Case*, 13 Wall. 397; *Kurtz v. Moffitt*, 115 U. S. 487. So also we think are interferences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others.

\* \* \* \* \*

Leaving out of account, therefore, any supposed effect of the *Erie* decision, we nevertheless are of opinion that state law should not be selected as the federal rule for governing the matter in issue. Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such a right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines. [Emphasis supplied.]

The reasoning underlying the necessary application of federal, rather than state law, in defining the reciprocal rights and duties arising out of the relationship, is apparent. The position of the United States with respect to that relationship, as the *Standard Oil* case shows, stems from peculiarly "federal sources". It rests on the constitutional authority to "declare War", "<sup>provide</sup>~~provide~~ for the Common Defence", "raise and support Armies", and "make Rules for the Government and Regulation of the land and naval Forces". United States Const., Art. I, Sec. 8. All of the "legal incidents" of that relationship must therefore, as this Court observed, be "governed by federal authority," rather than by different state laws. *United States v. Standard Oil Co.*, 332 U. S. 301, 305, 306.

The Federal Tort Claims Act, on the other hand, adopts the law of the state in which the injury or death has occurred with respect to establishing the liability of the United States. The Act expressly subjects the United States to liability for the negligent or wrongful acts of its employees to the same extent that liability is imposed "in accordance with the law of the place where the act or omission occurred." (28 U.S.C. 1346(b), Appendix, *infra*, p. 40.) By reason of the incorporation of the *lex loci delicti* into the Act, the courts are required to refer to the local statutory and decisional law in determining whether a tortious and actionable wrong has been committed. *United*

*States v. Spelar*, 338 U. S. 217, 219; *State of Maryland v. United States*, 165 F. 2d 869, 871 (C.A. 4); *Long v. United States*, 78 F. Supp. 35, 37 (S.D. Calif.); *Parmiter v. United States*, 75 F. Supp. 823, 824 (D. Mass.); *Wiltse v. United States*, 74 F. Supp. 786, 787 (W.D. La.).

Consequently, if soldiers' service-caused injuries or deaths are held to be cognizable under the Act, it would force a departure from the well-established rule requiring the incidents of government-soldier relationship to be determined exclusively by federal authority. Instead of the uniform treatment of such claims, made possible only by use of federal law, those claims would be disposed of on the basis of varying state laws. Such a result should not be lightly attributed to Congress. As observed by the Court of Appeals for the Fourth Circuit in its opinion in the *Jefferson* case (R. 24):

\* \* \* it is not reasonable to suppose, in the absence of an express declaration on the point, that Congress intended to adopt so radical a departure from its historic policy as to subject internal relationships within the military establishment to the law of negligence as laid down by the courts of the several states.

2. *It would subject service-caused injury and death claims to judicial scrutiny and thereby impair military discipline.* It is obvious that the military establishment, to function effectively,



must be a self-regulating body. It is for that reason that the military authorities have an absolute power of control over servicemen, enforced by rigorous sanctions. As this Court has pointed out (*In re Grimley*, 137 U. S. 147, 153):

\* \* \* An army is not a deliberate body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other. \* \* \*

Accord: *McCall v. McDowell*, 15 Fed. Cases 1235, 1240 (C.C.D. Cal., No. 8673). Thus, disobedience of orders is an offense at military law. Articles of War 64 and 65; 10 U.S.C. 1536, 1537. Since unhesitating obedience is the vital attribute of an efficient army, disobedience of orders is punishable by death. AW 64; 10 U.S.C. 1536. Disrespect shown to officers and non-commissioned officers is an offense, even though no disobedience is involved. AW 63; AW 65; 10 U.S.C. 1535, 1537. Still other provisions furnish the military establishment with additional authority to deal with negligent conduct among military personnel. Article of War 96 (10 U.S.C. 1568) provides *inter alia* that "disorders and neglects to the prejudice of good order and military discipline, all conduct of

a nature to bring discredit upon military service" are court-martial offenses. Similarly, Article 8 of the Articles for the Government of the Navy of the United States makes punishable any neglect on the part of naval personnel "in obeying orders, or [in being] culpably inefficient in the performance of duty." United States Navy Regulation 1948, p. 5.

Allowing soldiers access to the courts under the Federal Tort Claims Act for injuries sustained by them in the execution of military orders would, in large part, shift this regulation and control from the military establishment to the courts, which would then "be required to pass upon the propriety of military decisions and actions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of [the soldiers]." *Jefferson v. United States*, 178 F. 2d 518 (C.A. 4) (R. 24). The facts here are illustrative. It was only because Lt. Colonel Griggs was a soldier on active duty that he was operated on by an Army doctor on an Army operating table in an Army hospital, where the alleged negligence occurred. His being on active duty in the armed forces required him to submit to that operation by an Army surgeon only because of the military relationship between the two of them. In the absence of his military obligations and in the absence of his active duty status the particular negligence now complained of would

not have taken place. As respondent herself emphasizes in the complaint it was while her husband "was on active duty" as a "Lt. Colonel in the Army of the United States" that "official orders" directed him to the "Army Hospital at Scott Field Army Air Base \* \* \* for the purpose of submitting to treatment and operation" (R. 2-3). Had he refused medical or surgical treatment considered "necessary to enable [him] to perform properly his military duties" he would have been guilty of a breach of military discipline and subject to trial by court martial. AR 600-10, Sec. (e) (9). Accordingly, if respondent's assertion that such treatment was negligent allows her access to the courts under the Federal Tort Claims Act, it is obvious that the military decisions, orders, and conduct which constituted the basis for the treatment and operation would be thrown open to judicial examination.

Similar instances could be multiplied. The negligent discharge of firearms, the careless setting of an automatic machine gun in combat training, the negligent storage of ammunition, the negligent placement of barbed wire and shells along an infiltration course, negligence in ordering exhausted troops to hike an additional 25 miles, negligence in ordering troops to sleep in barracks not large enough to accommodate all, improper facilities for cleaning mess gear, the negligent quartering of troops in non-fireproof

barracks<sup>6</sup>—each of these events and many more would require the military's historic right to self-regulation to yield to judicial scrutiny of military decisions which can best be resolved by the military establishment itself rather than by the civil courts, and which must be resolved by the military establishment alone in order to preserve essential military discipline. This was forcefully pointed out by the Court of Appeals for the Fourth Circuit. In discussing the "added and greater reason for denying recovery where the injury is service-caused \* \* \* than where the injury is not service-caused," that court emphasized (*United States v. Brooks*, 169 F. 2d 840, 845, reversed as to non-service caused injuries. *Brooks v. United States*, 337 U. S. 49):

\* \* \* the unfortunate results, including the subversion of military discipline, if soldiers could sue the United States for injuries incurred by reason of their being in the armed service of their country. If soldiers could sue for such injuries as illness based on the alleged negligence of the company cook or mess sergeant, or if soldiers who contract sickness on wintry sentry duty had a right of action against the Government on the allegation of a negligent order given by the company commander, then the traditional grouching of the American soldier would result in the devastation of military discipline and morale.

<sup>6</sup> See *Feres v. United States*, No. 9, this Term, involving negligence in quartering troops in unsafe barracks.

*B. The Provisions of the Military Claims Act, which were Supplanted by the Federal Tort Claims Act, Confirm the View that Congress Intended to Exclude Such Claims from the Latter Act.*

The Military Claims Act (31 U. S. C. 223b) authorized the Secretary of the Army to settle claims of military personnel for injury or death caused by other Army personnel. However, in that same Act, Congress, recognizing the danger of allowing suit on service-caused claims, specifically provided that the Act did not apply to an injury or death occurring incident to the soldier-claimant's military service.<sup>7</sup> The instant claim, arising out of a service-incident situation, would not therefore have been cognizable under that Act. Section 424(a) of the Federal Tort Claims Act (60 Stat. 846) repealed the Military Claims Act in so far as it covered matters otherwise cognizable under the Federal Tort Claims Act.<sup>8</sup> That repeal certainly should not be interpreted as making cognizable under the Federal Tort Claims Act service-caused claims which had theretofore not been recognized under the repealed statute. To the contrary, application of the well-established rule that a new or substitute statute must be interpreted in light of the enactment

<sup>7</sup> These provisions also apply to the authority conferred on the Secretary of Navy with respect to torts of naval personnel. 31 U. S. C. 223d.

<sup>8</sup> It also repealed the Navy statute referred to in the preceding footnote. 60 Stat. 846.



which it supplanted, fortifies the conclusion that the Federal Tort Claims Act, just like its predecessor Military Claims Act, does not include claims by servicemen for injury or death sustained by them incident to their military service and as a result of the negligence of other military personnel. Accordingly, the Court of Appeals for the Second Circuit, observing that soldiers had never "been treated as having claims for injuries incident to their service [citing 31 U. S. C. 223b]," saw no reason for allowing recovery on such a claim under the Federal Tort Claims Act, the successor to 31 U. S. C. 223b. *Feres v. United States*, 177 F. 2d 535 (R. 21). See also *Samson v. United States*, 79 F. Supp. 406, 408 (S. D. N. Y.); *Jefferson v. United States*, 77 F. Supp. 706, 715 (D. Md.).<sup>9</sup>

*C. Administrative Construction of the Act Confirms the View that Service-Caused Injuries and Deaths are not Cognizable Thereunder.*

The Federal Tort Claims Act authorizes administrative adjustment of claims of a thousand dollars or less, and vests in the head of each federal agency the power to make a final and conclusive

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<sup>9</sup> There are additional arguments which we suggest may be of significance in determining congressional intent in respect of the precise question here involved. They are set forth in our brief in the *Brooks* case, Nos. 388 and 389, October Term, 1948. We recognize that those arguments were not accepted in the *Brooks* case, and, in the context of that case, were dismissed without discussion as unavailing (337 U. S. at p. 52, n. 4). This Court might, however, desire to reexamine them in the light of the different considerations which here obtain.

settlement of such claims. 28 U. S. C. 2672. The substantive provisions of the Act are equally applicable to these claims for less than a thousand dollars as they are with respect to claims in excess of that amount as to which access to the courts is allowed. Shortly after enactment of the Federal Tort Claims Act, and in order to discharge its responsibility with respect to the administrative adjustment of tort claims, the Army issued regulations on March 4, 1947 (12 F. R. 1476, 1478), defining the conditions of payment by the War Department of any claim within the provisions of the Act. 10 C. F. R. 1947 Supp. 306.29(1). Among these conditions was the provision that "claims for personal injury or death of military personnel \* \* \* incident to their service are not payable under the provisions of this" Act. The construction of the Act embodied in this regulation went into effect immediately, and has been consistently followed by the Army since that time. In revising its regulations in 1948, a similar provision was carried over in identical terms to Title 34 of the Code of Federal Regulations to which the provisions formerly appearing in Title 10 were transferred. See 34 C. F. R. 536.29(1) (12). That provision requires that prior to payment by the Army Department of any administrative claim under the Federal Tort Claims Act, a showing be made that the claim was not one for personal injury or death of military personnel incident to their service. 13 F. R. 5964, 5988, October 13,

1948. The identical provision was recodified in the 1949 Edition of the Code of Federal Regulations. 32 C. F. R. 536.29(1) (12). The Navy Department has also consistently refused to allow administrative recovery under the Act for personal injury or death claims of naval personnel incurred incident to their service. 32 C. F. R. (1949 Ed.) 750.3(c) (1).

Following the general principle of deference to administrative construction, this Court has often recognized that such a consistent administrative construction "is entitled to great weight, and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States v. Jackson*, 280 U. S. 183, 193." *United States v. Citizens Loan & Trust Co.*, 316 U. S. 209, 244; *United States v. Madigan*, 300 U. S. 500, 505. This general rule has, of course, special applicability to legislation as new as the Federal Tort Claims Act, for "administrative practice, consistent and generally unchallenged \* \* \* has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315; *United States v. American Trucking Assn's., Inc.*, 310 U. S. 534, 549; *Adams v. United States*, 319 U. S. 312, 314-315; *Edward's Lessee v. Darby*, 12 Wheat. 206, 210.

**Neither the Language Nor the Statutory Scheme of the Federal Tort Claims Act Will Permit Recovery Thereunder of Damages Resulting from a Service-Incident Injury Negligently Inflicted by One Member Upon Another Member of the Armed Services**

The statutory scheme of the Federal Tort Claims Act and the language employed to carry that scheme in effect are totally unsuited to deal with claims arising out of injuries negligently inflicted by one member of the armed forces upon another. The United States did not make itself unqualifiedly liable in tort. It accepted liability only for the negligent acts of its employees, acting within the scope of their employment in circumstances where the United States, if a private person, would be liable. In other words, its only liability under the act is that which could be imputed to it under the doctrine of *respondent superior*. *United States v. Campbell*, 172 F. 2d 500 (C. A. 5), certiorari denied, 337 U. S. 957; *United States v. Elazer*, 177 F. 2d 914 (C. A. 4), certiorari denied, 339 U. S. 903. Under that doctrine of vicarious liability, the employer may be held liable only for the conduct of an employee who himself would be legally liable for that conduct in an action for damages. If the party who actually causes the injury is free from civil liability, it is obvious that "his employer must also be entitled to a like immunity." *N. O. & N. E. Railroad Co. v. Jopes*, 142 U. S. 18, 24. Accordingly, under the Federal Tort Claims Act, if the act of the

federal employee, whose negligence is alleged, would cast no personal legal responsibility upon him, it follows that no responsibility can attach to the United States as his employer.

It has long been established that a soldier, in an action instituted by another soldier, may not be held personally liable for his negligence occurring in the course of their military service. The common law has steadfastly refused to recognize the right of a soldier to maintain an action against another soldier or against his officer for improper conduct while on duty. *Johnstone v. Sutton*, 1 T. R. 492, 99 English Reprint 1215; *Keighly v. Bell*, 4 Fost. & Fin. 763; *Edmonson v. Randle*, 19 T. L. R. 356, 359; *Warden v. Bailey*, 4 Taunton 67. Even where the defendant soldier's conduct has been motivated by malice, the English courts have refused to accord a right of action to a plaintiff soldier. *Duckins v. Paullet*, L. R. 52, B. 94 (1869). This same immunity from liability on the part of a soldier with respect to a suit instituted against him by another soldier for acts performed in the course of his duty has also been regularly acknowledged in the United States. *Martin v. Mott*, 12 Wheat. 19; *Pinsman v. Wilkes*, 12 How. 309;<sup>10</sup> *Vanderheyden v. Young*, 11 Johns. 150 (N. Y.); *Wright v. White*, 166 Oregon 136.

Underlying this well-established rule of law are

<sup>10</sup> Certain language in this case indicates that malice on the part of the defendant would strip him of the immunity otherwise available to him as a defense. However, later cases



considerations similar to those which, as noted above, pp. 21-28, show that Congress did not intend to subject the United States to any direct liability to soldiers for their service-caused injuries. Thus, the cases denying the right of a serviceman to maintain suit against another serviceman frequently point out that any other result would vest the civil courts with power to review military actions. This judicial intrusion and its accompanying sacrifice of the military establishment's right to self-regulation must be avoided if discipline, without which the armed forces "would be a rabble, dangerous to their friends, and harmless to their enemies,"<sup>11</sup> is to be maintained. *Tyler v. Pomerooy*, 8 Allen 480, 484 (Mass.); *In re Mansergh*, 1 Best & Smith, 400, 405. Other cases demonstrate that allowing suits between servicemen would mean that "any act done by any person in furtherance of [military] orders, would subject him to a responsibility in a civil suit \* \* \*. Such a course would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation." *Martin v. Mott*, 12 Wheat. 19, 30; *Johnstone v. Sutton*, 1 T. R. 492, 99 English

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reveal that even where his acts are alleged to be malicious, the defendant may avail himself of the same rule of immunity. *Randall v. Brigham*, 7 Wall. 523, 536; *Alzua v. Johnson*, 231 U. S. 106, 111; *Bradley v. Fisher*, 13 Wall. 335, 347; *Yaselli v. Goff*, 12 F. 2d 396 (C. A. 2), affirmed, 275 U. S. 503; *Gregoire v. Biddle*, 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949.

<sup>11</sup> *Johnstone v. Sutton*, 1 T. R. 492, 99 English Reprint 1215. See also pp. 25, 26, *supra*.

Reprint 1215; see *Herlihy v. Donahue*, 52 Mont. 601; *McCall v. McDowell*, 15 Fed. Cases 1235, 1240 (C.C.D. Cal., No. 8673). This threat of potential litigation, if such suits were recognized, would undoubtedly impair military efficiency. It is at least "as essential to the fearless and independent exercise of the authority conferred upon officers of the army and navy to enforce military discipline that they be free from the apprehension of vexatious suits grounded upon their official acts, as it is that a like immunity should be enjoyed by the judges of our civil courts." *Wright v. White*, 166 Oregon 136, 148.<sup>12</sup>

But whatever the basis of the rule prohibiting suits between servicemen on claims for damages caused by their military service, it is clear the rule would be fully applicable if the instant action had been directed against the negligent Army medical officer rather than against the United States.

---

<sup>12</sup> *Weaver v. Ward*, Hobart 135, 80 English Reprint 284, comes to a different conclusion. That case, which was decided in 1616, does not take into account any of the considerations relied on by the subsequent cases, has never been followed and has in effect been repudiated by the consistent line of subsequent cases.

*Little v. Barrand*, 2 Cranch 170; *Mitchell v. Harmony*, 13 How. 115; *Bates v. Clark*, 95 U. S. 204; *Franks v. Smith*, 142 Ky. 232; *Bishop v. Vandercook*, 228 Mich. 299; and *State v. Spurlis*, 27 Tex. 627 (See petitioner's brief in the *Jefferson* case, No. 29, this Term, pp. 12-13), holding that military or naval personnel may be held liable for torts committed by them against civilians, are, of course, inapposite in a situation where the tort was committed by one member of the armed forces against another member of those forces in the course of their military service. In those cases, considerations of military discipline were not significant.

Both Lt. Colonel Griggs and the Army medical officer were on active duty and acting under military orders; the former to submit to the operation, the latter to perform it. Since that operation was a direct incident of the military relationship between Lt. Colonel Griggs and the Army surgeon, there can be no doubt that the latter could not be held personally liable for his negligent conduct in the course of the operation which he had been directed to perform. And, in the absence of personal liability on his part, the doctrine of *respondent superior* prohibits the imposition of any derivative liability upon the United States under the Federal Tort Claims Act.

#### IV

##### **Reversal of the Judgment Below Would Not Leave Respondent Financially Unprotected**

For the reasons set forth above we submit that respondent's claim for the death of her husband, incurred incident to his service and as a result of the negligence of other military personnel, is not actionable under the Federal Tort Claims Act. That does not mean, however, that the United States, under other statutes and regulations, is not compensating respondent for her loss. She is still entitled to the full benefits and payments under the appropriate military and veterans' benefit laws. In fact, as shown in the letter from the Veterans' Administration (R. 25), respondent, in the two-

year period immediately after her husband's death, received from the United States, on account of the death of her husband in service, pension payments in excess of \$2,100. It is also estimated that her total pension payments from the United States will aggregate an additional \$18,000.<sup>13</sup> Moreover, as stated in a letter from the Department of the Army (R. 26), respondent has also received from the United States, because of the death of her husband in service, the sum of \$2,695, representing the six months' death gratuity under the Act of December 17, 1919, as amended, 41 Stat. 367, 57 Stat. 599, 10 U.S.C. 903.

It is significant to note that these payments under the military and veterans' laws total an expected amount in excess of \$22,000. This figure must be compared the \$15,000 limitation imposed by Illinois law on recoveries in wrongful death actions. Act of July 18, 1947, Laws of Illinois, 1947 (p. 1094).<sup>14</sup> That limitation, as respondent points out in her complaint, applies to the instant suit under the Federal Tort Claim Act (R. 4).

<sup>13</sup> This estimate is based upon the receipt of a \$75 monthly payment over an expected life span of 20 years for a 55 year old woman (U. S. Life Tables and Actuarial Tables 1939-1941, Thomas N. E. Greville, Government Printing Office, 1946, p. 37); and see letter from Veterans' Administration stating that respondent was 53 years of age when her husband died in December, 1947 (R. 4, 25-26). The estimate also assumes that the appellant will not remarry and thus become ineligible for monthly payments.

<sup>14</sup> This Act amended the Illinois Injuries Act, Illinois Revised Statutes, chapter 70, so as to increase the maximum liability in a wrongful death action from \$10,000 to \$15,000, effective July 18, 1947. *Monroe v. Chase*, 76 F. Supp. 278 (E.D. Ill.).

Consequently, any possible liability here on the part of the United States could not exceed the sum of \$15,000, diminished by the value of past and prospective payments made by the United States to respondent under the military and veterans' laws on account of the same death which forms the basis of the instant action. *United States v. Brooks*, 176 F. 2d 482 (C.A. 4).<sup>15</sup> Since the payments under the military and veterans' laws are expected to exceed the \$15,000 maximum recoverable, there apparently could be no recovery of damages in the instant case even if service-caused deaths were held to be compensable under the Federal Tort Claims Act.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be reversed.

PHILIP B. PERLMAN,

*Solicitor General,*

H. G. MORISON,

*Assistant Attorney General,*

NEWELL A. CLAPP,

*Special Assistant to the Attorney General,*

PAUL A. SWEENEY,

JOHN R. BENNEY,

MORTON HOLLANDER,

*Attorneys.*

SEPTEMBER 1950

<sup>15</sup> This decision, dealing with the question of diminution of damages, was handed down by the Court of Appeals for the Fourth Circuit on remand of the *Brooks* case to that court by this Court.



## APPENDIX

Sections 1346 (b), 1402 (b), 2674, and 2680 of Title 28, United States Code [formerly the provisions of the Federal Tort Claims Act]<sup>16</sup> provide:

28 U. S. C. 1346. *United States as defendant.*

\* \* \* \* \*

(b) Subject to the provisions of chapter 173 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

\* \* \* \* \*

28 U. S. C. 1402. *United States as defendant.*

\* \* \* \* \*

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff

<sup>16</sup> See footnote 1, *supra*, p. 2.

resides or wherein the act or omission complained of occurred.

28 U. S. C. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U. S. C. 2680. *Exceptions.*

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

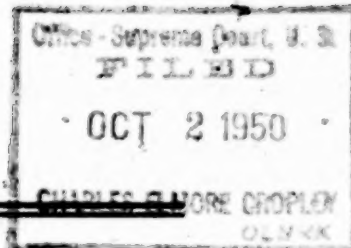
(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

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SUPREME COURT, U.S.



No. 31

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IN THE  
**SUPREME COURT OF THE  
UNITED STATES**

OCTOBER TERM, 1950.

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UNITED STATES OF AMERICA, PETITIONER

v.

EDITH LOUISE GRIGGS, as Executrix of the Estate of  
Dudley R. Griggs, Deceased, RESPONDENT.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE TENTH CIRCUIT

---

**BRIEF FOR RESPONDENT**

---

JAMES S. HENDERSON,  
209 Equitable Building,  
Denver, Colo.  
*Counsel for Respondent.*



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**IN THE  
SUPREME COURT OF THE  
UNITED STATES**

OCTOBER TERM, 1950.

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UNITED STATES OF AMERICA, PETITIONER

v.

EDITH LOUISE GRIGGS, as Executrix of the Estate of  
Dudley R. Griggs, Deceased, RESPONDENT.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE TENTH CIRCUIT

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**BRIEF FOR RESPONDENT**

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**OPINIONS BELOW**

The order of the district court (R.5) is not reported. The opinion of the United States Court of Appeals for the Tenth Circuit (R.6-9) is reported at 178 F (2d) 1.

**JURISDICTION**

The judgment of the court of appeals was entered on November 16, 1949 (R.9). A petition for rehearing was

denied on January 9, 1950 (R.26-27). The petition for a writ of certiorari was filed on March 16, 1950, and was granted on May 8, (R.29). The jurisdiction of this Court rests upon 28 U.S.C. Sec. 1254 (1).

## STATUTE INVOLVED

The statute involved is the Federal Tort Claims Act as it existed prior to the codification of Title 28 on June 25, 1948. The facts forming the basis of the claim asserted occurred and the action was commenced prior to the change in the provisions. The pertinent provisions as originally enacted are set forth in Appendix A *infra* pp. 28-30. The Respondent agrees with the Government that the amendment made no essential change, and that the rights of litigants in pending suits are as they existed under the former law.

## QUESTION PRESENTED

In *Brooks v. the United States*, 337 U.S. 49, this Court held that the Government is liable under the Federal Tort Claims Act to a soldier on furlough for injuries then tortiously inflicted upon him by other military personnel. The question presented here is:

Is a member of the armed forces on hospital status in an army hospital in Illinois, as distinguished from military duty, under the protection of the Federal Tort Claims Act so that his Executrix may recover damages for his death caused by the negligence of hospital personnel, then being employees of the United States, acting within the scope of their employment?

In the *Brooks* case this Court answered in the affirmative the question as to whether members of the armed forces can recover under the Federal Tort Claims Act for injuries not incident to their service, but reserved the

question as to whether they can recover for injuries which were incident to their service. The questions presented in this case, therefore, are as follows:

(1). Was Decedent's death incident to his service?

(2). If his death was incident to his service, is his Executrix entitled to recover under the Federal Tort Claims Act, the applicable law of the state providing for survival of a tort action in favor of the personal representative for the benefit of the next of kin?

### **CONCISE STATEMENT OF THE CASE**

The facts as stated on pages 2 and 3 of the Government's brief are correct. They omit the allegation in the complaint that the death of Lt. Colonel Griggs resulted from the negligence of the Defendant and its agents acting within the scope of their employment under circumstances where a private person would have been liable for such death in accordance with the law of Illinois, in which state the acts and omissions constituting the acts of negligence occurred, and that the death occurred in Missouri (R.3). The complaint also alleges that the appellant is the widow and executrix of Lt. Colonel Griggs, and that she and a son are the only heirs; that Lt. Colonel Griggs was a resident of Colorado at the time of his death; that Petitioner is also a resident of such state. (R. 2, 4)

The complaint further sets forth the Statute of Illinois which confers a right of action for negligence resulting in death upon the personal representatives of Decedent for the benefit of the next of kin, to be distributed as the personal property of one dying intestate, and which also states that the Law of Illinois, as interpreted by its courts, provides this right of action where the wrongful neglect or

default occurred in Illinois, although death occurred elsewhere. (R. 3, 4)

The above facts are necessary to establish the claim upon which relief should be granted, but the Government does not raise any question concerning the right of the Petitioner to bring this action, nor does the Government claim that the rights conferred by the Illinois statute and decisions are otherwise than as stated in the complaint. The discussion in this brief will therefore be directed only to a discussion of the matters raised by the Government.

### SUMMARY OF ARGUMENT

The same fundamental issue is presented in *Feres v. United States* (No. 9 this term) and *Jefferson v. United States* (No. 29 this term). Briefs by the claimants in such cases have been filed and much of the argument therein contained is applicable here. The *Feres* case involves an action brought by the personal representative of the Decedent, whereas the claimant in the *Jefferson* case himself suffered the injuries which did not result in his death, but which injuries were the result of negligent acts of hospital personnel, employees of the United States, in an army hospital, acting within the scope of their employment while the member of the armed forces was not engaged in performing military duties. The circumstances of the negligence in this case are similar to those in the *Jefferson* case. Death resulted in this case, as it did in the *Feres* case.

The argument will show that:

I. The decedent's death was not incident to his service. It was caused by negligence occurring in a hospital under the control of the army, and at such time decedent was not engaged in any inherently dangerous activity.

II. Even if decedent's death had been incident to his service, his executrix is entitled to recover under the Fed

eral Tort Claims Act, the applicable law of the state providing for survival of a tort action in favor of the personal representative for the benefit of the next of kin. Discussion on this point will be directed to

A. Affirmative argument in support of petitioner's claim, under which will be considered

1. The language of the Federal Tort Claims Act makes its provisions applicable to the facts of this case.

2. The history of the bill through Congress shows that it was the intent of Congress that the provisions of the Federal Tort Claims Act should apply to the facts of this case.

3. The rule of the *Brooks* decision applies to the facts of this case.

4. The rules of statutory interpretation indicate that the Federal Tort Claims Act is applicable to the facts of this case.

5. The Illinois statute and decisions provide for a remedy in favor of the personal representative for the benefit of the next of kin of a decedent whose death results from negligence.

B. Answer to the Government's Argument, under which will be considered

1. Even though decedent's death may have been incident to his service, his executrix is nevertheless entitled to recover under the Federal Tort Claims Act.

2. The Federal Tort Claims Act was intended by Congress to apply to claims by service men for injuries or death incident to their service.

3. Neither the language nor the statutory scheme of the Federal Tort Claims Act precludes recovery of damages resulting from a service-incident injury negligently inflicted



upon one member of the armed forces by another member of the armed forces.

4. The matter of the reduction of the petitioner's claim on account of any other benefits or payments is not now before this court.

## ARGUMENT

### DECEDENT'S DEATH WAS NOT INCIDENT TO HIS SERVICE.

The member of the armed forces in the *Jefferson* case (No. 29 this term) and in the instant case were each undergoing treatment in an army hospital. In each case the negligence of personnel in the hospital under the control of the United States acting within the scope of their employment proximately resulted in injury ~~in~~ the *Jefferson* case, and death in the instant case. In neither case was the member of the armed forces required to perform any duty involving an unusual hazard. In neither case were they involved in carrying out any activities of an inherently dangerous nature. The ailments for which they were undergoing treatment had no relation to the carrying out of any military duty, combatant or otherwise, which resulted in the condition necessitating the treatment.\*

The brief in the *Jefferson* case, (pp. 47) points out that a member of the armed forces may be required to undergo hospital treatment for the purpose of maintaining his military fitness, but that the same argument could have been advanced in *Brooks v. United States*, 337 U.S. 49 on the ground that the military personnel were on furlough for

\*The complaint in the instant case does not state the nature of the malady from which the Decedent was suffering, but it is not alleged nor does the Government claim that it resulted from combatant activities or from obedience to any orders given by a superior officer involving any inherent danger.

the purpose of rest and rehabilitation designed to better fit them for military service. It further points out that the risks and dangers ordinarily incident to military service do not include injuries resulting from negligence of medical personnel in the treatment of an ailment connected with such service. The argument thus found on pages 4-7 of the petitioner's brief in the *Jefferson* case (No. 29 this term) is applicable here. For the sake of brevity, it is not repeated but is inserted as Appendix B (pp. 31-33).

EVEN IF DECEDENT'S DEATH WAS INCIDENT TO HIS SERVICE, HIS EXECUTRIX IS ENTITLED TO RECOVER UNDER THE FEDERAL TORT CLAIMS ACT, THE APPLICABLE LAW OF THE STATE PROVIDING FOR SURVIVAL OF A TORT ACTION IN FAVOR OF THE PERSONAL REPRESENTATIVE FOR THE BENEFIT OF THE NEXT OF KIN.

### **AFFIRMATIVE ARGUMENT IN SUPPORT OF PETITIONER'S CLAIM**

THE LANGUAGE OF THE FEDERAL TORT CLAIMS ACT MAKES ITS PROVISIONS APPLICABLE TO THE FACTS OF THIS CASE.

The revision of the judicial code has changed some of the language and the arrangement but not the substance of the Federal Tort Claims Act.

Since Lt. Colonel Griggs' death occurred on December 18, 1947 (R.3), and since this action was commenced on May 27, 1948 (R.2), the language of the Act as originally written constitutes the governing law. The material portions of this act appear in Appendix A (pp. 28-30).

The act makes the United States liable "to the same claimants" under the same circumstances as a private person would be liable for personal injury or death caused by a wrongful act or omission of any employee of the government while acting within the scope of his office or employ-

mined in accordance with the law of the place where the act or omission occurred. The act contained some exceptions one of which was relied upon by the Government in the Court of Appeals, but has not been urged here, and will, therefore, not be discussed. Two of these exceptions, however, should be noted. 28 U.S.C. Sec. 943 (now 2680) contains the following exceptions:

(j) claims "arising out of combatant activities of the military and naval forces and coast guard during time of war."

(k) claims "arising in a foreign country."

THE HISTORY OF THIS BILL THROUGH CONGRESS SHOWS THAT IT WAS THE INTENT OF CONGRESS THAT ITS TERMS SHOULD APPLY TO THE FACTS OF THIS CASE.

The intent of Congress clearly appears from the circumstance that the original draft of the above exceptions excluded claims "arising out of activities of the military or naval forces or of the coast guard during time of war", and "arising in foreign countries". The word "combatant" was inserted before the word "activities" by amendment on the floor of the House (92 Congressional Record 10143). Congress thus has definitely been shown to have considered the dire consequences predicted by the Government should members of the armed forces be covered by the act, by excluding a large class of cases where voluminous claims involving heavy damages might be asserted, but by the same act it nevertheless included expressly and deliberately, a large class of cases within which the instant case comes. Had Congress not deemed this exclusion sufficient it would not have expressly and deliberately limited the exclusion, but would have enlarged the exclusion by rejecting the amendment which inserted the word "combatant", or it would have made a broader exclusion. Had it intended to do what the government said it intended, it could readily have devised and written it to the act a specific exclusion of men

bers of the armed forces suffering from torts committed while they were on active duty.

The Bill H.R. 181 which embodies the Tort Claims Act was introduced in the 79th Congress with all of the twelve exceptions which were finally enacted in substantially the form in which they were introduced, except in respect to the word "combatant" as hereinbefore stated. There was also a thirteenth exception which excluded from the coverage of the act

"any claim for which compensation is provided by the World War Veterans Act of 1924 as amended".

This exception was rejected by Congress.

The deliberate insertion of the word "combatant" and the deliberate rejection of this proposed exception demonstrate that Congress did not intend to exclude members of the armed forces suffering injuries or death in the United States, and not in combat, regardless of any other rights which might have been conferred under the World War Veterans' Act of 1924 as amended. (38 U.S.C. Ch. 10)

#### THE RULE OF THE BROOKS DECISION APPLIES TO THE FACTS OF THIS CASE.

This Court in *Brooks v. United States*, 337 U.S. 49, 51 said:

"The statutes terms are clear. They provide for district court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of service men'. The statute contains twelve exceptions. None exclude petitioner's claims. One is for claims arising in a foreign country. A second excludes claims arising out of the combatant activities of the military or naval forces or Coast Guard during time of war. These and other exceptions are too lengthy, specific, and close to the present

problem to take away petitioner's judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim'. It would be absurd to believe that Congress did not have the service men in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.

"More than the language and framework of the act support this view. There were eighteen tort claims bills introduced in Congress between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was introduced the exception concerning service men had been dropped. \* \* \* When H.R. 181 (embodying the Tort Claims Act of 1946) was included in the Legislative Reorganization Act, the last vestige of the exclusion for members of the armed forces disappeared."

One proposition is clear from the *Brooks* case. This Court held that Congress did not intend to exclude all members of the armed forces from the benefits of the act. Even the reversed majority opinion of the Court of Appeals for the 4th Circuit in *United States v. Brooks*, 169 F. (2d) 840, 845, logically concedes that either all members of the armed forces are included or all are excluded. Such language is as follows:

"And the Federal Tort Claims Act, as we interpret it, either excludes (subject of course to the express exceptions) soldiers altogether or completely includes them. We are quite unable to find in the act anything which would justify us in holding that Congress intended to include death or injury to a soldier which was not service caused (the *Brooks* case), and

to exclude service caused injury or death (the *Jefferson* case).”

This Court having held, therefore, that some members of the armed forces are included within the terms of the act, the logic of the above concession that it applies to either all or none renders it inevitable that all members of the armed forces are included.

By virtue of the *Brooks* decision the Government cannot successfully contend that all members of the armed forces are excluded from the coverage of the act.

Had Congress intended to exclude some members of the armed forces it would have merely amended the proposed exception instead of deliberately striking it out *in toto*.

THE RULES OF STATUTORY INTERPRETATION INDICATE THAT THE FEDERAL TORT CLAIMS ACT IS APPLICABLE TO THE FACTS OF THIS CASE.

In *Osaka v. United States*, 300 U.S. 98, 101, this Court said:

“(This) is not to construe the statute but to add an additional and qualifying term to its provision. This we are not at liberty to do under the guise of construction, because, as this Court has so often held, where the words are plain, there is no room for construction.”

So here Congress having undertaken the insertion of certain specific exclusions, it is not to be presumed that it overlooked an important further exclusion, but rather that it named all of the exclusions that it intended, and this Court as in the *Osaka* case, is not at liberty under the guise of construction to add to its provisions.

In *Equitable Life Assurance Soc. v. Pettus*, 140 U. S. 226, 233, this Court said:

“This construction is put beyond doubt by see



5986, which, by specifying four cases--in which the three preceding sections "shall not be applicable"--necessarily implied that those sections shall control all cases not so specified."

The specific exclusions therefore carry the implication that all claims thus not excluded may be successfully asserted.

Another statement of such rule arose in an action where the defense attempted to limit the right to recover against the sovereign to uncontroverted liabilities. Mr. Justice Cardozo, while sitting on the New York Court of Appeals, said in *Anderson v. Hayes Construction Co.*, 243 N.Y. 140, 147; 153 N.E. 28, 29:

"The exemption of the sovereign from suit involves hardship enough when consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

The Government in effect says that Congress, having made detailed exclusions from the coverage of the act, nevertheless, really intended another important exclusion but forgot or overlooked writing it in; that Congress, although it considered an exclusion which would have eliminated substantially all members of the armed forces from the coverage of the act, nevertheless rejected such exclusion, but nevertheless intended to exclude an important class of such members, but forgot or overlooked doing so; that Congress, while still considering the bill, and foreseeing certain dire consequences, if all torts arising from combatant activities during time of war be included, therefore excluded such torts, but intended to exclude more, or rather intended to exclude a certain class of claimants, being members of the armed forces whether or not engaged in such combatant activities, but that Congress likewise forgot or overlooked doing this also.

The scrupulous care which Congress exercised by inserting the word "combatant" and rejecting the proposed thirteenth exception is a complete and conclusive refutation.

By every test the applicability of the Federal Tort Claims Act to the facts of this case is made increasingly evident.

THE ILLINOIS STATUTE AND DECISIONS PROVIDE A REMEDY IN FAVOR OF THE PERSONAL REPRESENTATIVE FOR THE BENEFIT OF THE NEXT OF KIN OF A DECEDENT WHOSE DEATH RESULTS FROM NEGLIGENCE.

Neither in the District Court nor in the Court of Appeals did the Government contend that the remedy did not exist. The Government's brief in this proceeding does not so contend. For the sake of brevity, a discussion of the Illinois statute and decisions is therefore not included here, but may be found in Appendix C (pp. 34, 35).

## ANSWER TO THE GOVERNMENT'S ARGUMENT

EVEN THOUGH DECEDENT'S DEATH MAY HAVE BEEN INCIDENT TO HIS SERVICE, HIS EXECUTRIX IS NEVERTHELESS ENTITLED TO RECOVER UNDER THE FEDERAL TORT CLAIMS ACT.

The clear implication of the *Brooks* opinion is that recovery may be had under the Federal Tort Claims Act for an injury or death even though incident to the service.

The argument of the Government pages 9-19 of its brief is to the effect that the *Brooks* opinion impliedly recognized an exception in the case of an injury incident to the service because the opinion states that the cases *Dodson v. United States*, 27 F. (2d) 807 and *Bradley v. United States*, 151 F. (2d) 742, deny to members of the armed forces rights of action for injuries sustained under the Public Vessels Act, (46 U. S. C. Ch. 22). In both of these cases the injuries were sustained by naval personnel in line of duty. The Court in the *Dodson* case said:

"We believe that Congress meant to leave upon

the members of the naval forces the same risks of injuries suffered in the service as they had before.”

The *Bradley* case quoted the *Dodson* case with approval and both cases were available to Congress when the Federal Tort Claims Act was enacted in 1946.

In both cases, the Court held that the member of the armed forces had no right under the Public Vessels Act (46 U. S. C. Ch. 22) because each member of the armed forces had a remedy under another act enacted for the benefit of such members of the armed forces. In line with such decisions, H. R. 181 which embodied the Federal Tort Claims Act of 1946, was introduced in the 79th Congress with an exception for exclusion from the coverage of the act of

“any claim for which compensation is provided by the World War Veterans Act of 1924 as amended.”

This exception was eliminated by Congress. It deliberately rejected a provision in the Federal Tort Claims Act which would have carried into such act the principle established by the *Dodson* and *Bradley* cases. It thereby repudiated and made inapplicable to the Federal Tort Claims Act the doctrine of the *Dodson* case affirmed in the *Bradley* case that members of the armed forces should continue to bear the same risks of injury in the service of the United States as they had before.

In other words, it intended that members of the armed forces sustaining injuries incident to their service should not be relegated to the same remedies that they had before, but should have such additional rights as the terms of the Federal Tort Claims Act might confer upon them.

In the *Brooks* case this Court was not called upon to construe the intent of Congress with respect to its repudiation of the *Dodson* and *Bradley* doctrine and properly declined to do so. The intent of Congress is nevertheless clear.

The Government on p. 15 of its brief quotes from Judge

Swan's opinion in the *Dodson* case, 27 F. (2d) 808, 809, where he states that any other conclusion would involve a radical departure from the Government's long standing policy with respect to the personnel of its naval forces. By rejecting the above proposed exception, having the *Dodson* and *Brady* cases available to it, Congress nevertheless made the departure in so far as the Federal Tort Claims Act is concerned. The effect of this departure makes the Federal Tort Claims Act apply to injuries incident to the service as well as to injuries sustained on furlough.

The above answer applies also to the cases cited on page 17 of the Government's brief wherein members of the armed forces sustained injuries by reason of the negligence of persons operating railroads while under the control of the Director General of Railroads during or after the first World War.

The case of *Goldstein v. New York*, 281 N. Y. 396, 24 N.E. (2d) 97, is not applicable because the ground of the decision in that case was that the militiaman driving the truck was not an "employee" of the state, within the meaning of the New York Tort Claims Act (Laws of N. Y., 1920, ch. 92, Sec. 12; Laws of New York, ch. 860, sec. 8). Congress also had this case available to it when it enacted the Federal Tort Claims Act but nevertheless repudiated that rule by specifically providing in 28 U. S. C. sec. 941 (now sec. 2671)

"employees of the Government includes \* \* \* members of the military or naval forces of the United States."

It is therefore plain that Congress intended that any person suffering damage as the result of negligence of a member of the armed forces would not be denied relief under the doctrine of the *Goldstein* case, and again it had in mind that the injury in that case was also an injury incident to the service of the member of the militia who was killed as the result of the negligence of another member of the militia.

The United States Court of Appeals for the 10th Circuit was therefore amply justified in holding that Congress intended to give to all members of the armed forces the full rights accorded to all other claimants under the Federal Tort Claims Act.

THE FEDERAL TORT CLAIMS ACT WAS INTENDED BY CONGRESS TO APPLY TO CLAIMS BY SERVICE MEN FOR INJURIES OR DEATH INCIDENT TO THEIR SERVICE.

The Government urges that such an intention would subject the unique relationship of the United States and its soldiers to the varying laws of the different states and would cause judicial intrusion into the realm of military and naval affairs. The argument under the preceding subdivision is one reason why this contention is unsound. Further reasons are indicated by the exceptions which were included in the Federal Tort Claims Act, 28 U.S.C., sec. 943 (now sec. 2680). These exceptions are:

(j) "Any claim arising out of the combatant activities of the military or naval forces or of the coast guard during time of war.

(k) "Any claim arising in a foreign country."

As already indicated the word "combatant" had been omitted from the exception in the bill as originally introduced, but was later inserted.

By excluding any injuries occurring in a foreign country, it eliminated a large class of claims, the probability of occurrence of which it was certainly aware, which intent becomes all the more evident by reason of the fact that Congress chose to make the laws of the different states the test of liability.

The recognition of rights and liabilities under state law was not a new experience for Congress when the Federal Tort Claims Act was adopted. For a long period of time prior to 1938, the rules of procedure of the various states

had constituted the rules of civil procedure for the United States courts in actions at law. Rights of persons under the Bankruptcy Act (bankruptcy being a purely federal question) have long been and still are determined by the property laws of the different states, and rights and liabilities of taxpayers under the Federal Revenue Acts depend upon the laws affecting property rights of the different states.

If the question of what is or is not income in a matter of a taxpayer's liability to the United States may be determined by the laws of different states, there is nothing incongruous in leaving to the laws of the various states the matter of the presence or absence of a tort liability under any particular state of facts even in cases between the government and a soldier, who like a taxpayer, owes a duty to his government, particularly when Congress in unequivocal language made the state law the test of liability.

The case of *United States v. Standard Oil Co.*, 332 U.S. 301, was also available to Congress at the time when the Federal Tort Claims Act was enacted. The Court in such case held that Congress, not this Court or any other Federal Court, is the custodian of the national purse; and that Congress is the primary and most often the exclusive arbiter of Federal fiscal affairs; and that to this end, it cannot be assumed that Congress has been ignorant that liabilities have often arisen from injuries involving soldiers; that it is within the power of Congress to establish liabilities in favor of the United States as well as liabilities against the United States; that the rules of decision relative to such liabilities are for Congress and not for the courts; that if the United States is to receive an advantage, it is for Congress to assert it; and that Congress not having asserted a power which it could have asserted in favor of the United States, this Court would not so assert it.

The application of that case to the facts here is that Congress, not having asserted a rule which would have been



to the financial advantage of the United States when it could have so asserted it by an exception to the Federal Tort Claims Act, it is not within the province of this Court or of any other court to assert such advantage. Since Congress expressly rejected a provision which would have asserted a rule to the financial advantage of the United States and since it could have enlarged the class of excluded claimants had it so desired, which action would have been to the financial advantage of the United States, but did not do so, this Court should not assert such advantage.

The Government fears the impairment of military discipline. There can be no question that obedience and respect for superiors are prime requisites of every member of the armed forces, and that failure to fulfill those requirements is an offense which a court martial may punish. The Government foresees the grave possibility that superior officers will hesitate to issue orders if negligence or errors in judgment will subject the Government to liability, and that military efficiency will thereby suffer. Common experience is to the contrary.

War and preparation for war are necessarily wasteful. A commanding officer is not deterred from obtaining a military objective by contemplating the financial cost nor the waste of materials or money necessary to that end. He will properly conserve the lives of men entrusted to his care even though the cost in supplies, munitions, and other inevitable expenditures be vastly increased thereby. A conscientious army, naval, or marine officer is under a duty to guard the welfare of his men. The orders which he issues will be directed to that end, and their welfare will be considered paramount to the cost of insuring it. The Federal Tort Claims Act will not, and should not, deter an officer from issuing an order which he believes to be right.

The Government fears that disobedience and disrespect and lack of morale will be encouraged in the one whose duty

it is to obey. A soldier who faces automatic machine gun fire in combat training will not be defiant nor be deterred from obeying orders because he knows that the Federal Tort Claims Act gives him a right of action if he should be injured or killed through a fellow soldier's or officer's blunder. The dangers inherent in the situation will be far more of a deterrent than any right to recover in a civil action at law. Respect for superior officers will be given or withheld depending upon the personality, demeanor and good judgment of the officer and not by reason of the presence or absence of a remedy under the Federal Tort Claims Act. Congress having had the experience of four years of war, certainly considered these consequences and determined that the morale of the armed forces would be improved by the knowledge that so far as the law could give redress for injuries or deaths sustained as the result of negligence, the service man or his family would have such additional rights as the law conferred. The effect of the act should be to build, not to break down morale, but at any rate, the probability of these consequences was for Congress, and Congress, by its action determined adversely to the Government's contention. Whether right or wrong, this determination is decisive.

It is further urged by the Government that the provisions of the Military Claims Act (31 U. S. C., sec. 223(b)), which were supplanted by the Federal Tort Claims Act, indicate that Congress intended to exclude such claims from the latter. The exclusion by Congress from the Military Claims Act of service caused claims indicates that when Congress intended to exclude such claims it specifically so provided. The failure so to provide in the Federal Tort Claims Act indicates that Congress did not choose to exclude such claims from such act. This conclusion is fortified by the elimination of the proposed exception eliminated from the original bill, which has already been discussed. The repeal of the Military Claims Act (31 U. S. C., sec. 223(b)) by the Federal Tort Claims Act may not in itself have been sufficient, but the considerations already stated are sufficient.

The general principle that a new or substitute statute must be interpreted in the light of the statute it supplants does not justify the conclusion that a broad act such as the Federal Tort Claims Act must be interpreted in the light of a much narrower statute such as the Military Claims Act (31 U. S. C., sec. 223(b)), particularly when one of the exceptions of the latter act was not included in the former act.

There can, of course be no quarrel with the Government's contention that administrative construction is entitled to consideration. The vigor of the defense in the *Brooks* case and in the three cases now before this Court indicates the attitude of the Department of Defense, and such attitude is reflected in the regulations referred to on pages 31 and 32 of the Government's brief. However, one important element of the rule as the Government concedes (p. 32), is "that the practice must be generally unchallenged".

The vigor with which this contention of the Government has been resisted in all of these cases indicates just as conclusively that this administrative practice falls far short of being unchallenged.

Another element which was present in *United States v. American Trucking Association*, 310 U. S. 534, was that the Interstate Commerce Commission assisted in drafting the act and its views in respect to the interpretation thereof were accorded appropriate deference. The Department of Defense had no conspicuous part in drafting the Tort Claims Act which, in one form or another, had been submitted to eighteen sessions of Congress over a period of many years.

The purpose of this proceeding is to settle the difference of opinion as to whether or not this administrative ruling conforms to the intention of Congress.

NEITHER THE LANGUAGE NOR THE STATUTORY SCHEME OF THE FEDERAL TORT CLAIMS ACT PRECLUDES RECOVERY OF DAMAGES RESULTING FROM A SERVICE-INCIDENT INJURY NEGLIGENTLY INFLICTED UPON ONE MEMBER OF THE ARMED FORCES BY ANOTHER MEMBER OF THE ARMED FORCES.

The Government correctly states that the United States is liable only for the negligent acts of its employees acting within the scope of their employment, in circumstances where the United States, as a private person, would be liable, or in other words, in circumstances where the master would be liable for the negligence of the servant. It is also conceded that ordinarily this can be imputed only under circumstances where the servant would himself be liable. The Government then urges that under the common law one soldier is not liable in an action by another soldier for negligence occurring in the course of their military service.

Not all the cases cited by the Government support the theory since two of them recognize certain exceptions. But assuming that the general principle is correct, the non-liability of the soldier is based upon a personal immunity growing out of the relationship. A similar immunity has been recognized by the common law rule that a wife or child cannot hold the husband or father liable in tort for personal injuries. The reason, as in the case of the soldier, was based upon a relationship, namely that of the family, which would suffer if harmony among the members should be disrupted by litigation.

The reason why an immunity exists in the case of the fellow soldier relationship is likewise based upon the danger to the military establishment if a fellow soldier should be subjected to the possibility of litigation. But the law of master and servant has recognized that although a servant acting in the course of his employment might not be liable to his wife or child by reason of his immunity, ~~neverthe-~~ ~~less~~, the master may nevertheless be held liable. The *Restatement of the Law of Agency*, sec. 217 (2) states:

“A master or other principal is not liable for acts of a servant or other agent which the agent is privileged to do although the principal himself would not be so privileged, but he may be liable for an act as to which the agent has a personal immunity from suit.”

The comment upon this section contains the following:

“Thus if a servant while acting within the scope of employment negligently injures his wife, the master is subject to liability.”

Although some earlier American cases are to the contrary, the rule adopted in the *Restatement* is supported by the overwhelming weight of authority. In many later cases, the earlier rule has been expressly repudiated. The case most frequently cited in support of the rule adopted in the *Restatement* is *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 255; 164 N.E. (2d) 42. This case involved a claim asserted by a wife against her husband's employer for injuries resulting from the husband's negligence within the scope of his employment. Mr. Justice Cardozo, speaking for the court said:

“We have held that a wife may not maintain an action against a husband, nor a husband against a wife for personal injuries, whether negligent or wilful \* \* \* There is no doubt that this was the rule at common law. \* \* \*

“The disability of wife or husband to maintain an action against the other for injuries to the person is not a disability to maintain a like action against the other's principal or master. There are indeed decisions to the contrary by courts of other states. (Citing cases from Iowa and Michigan) We are unable to accept them.”

The reason for the rule is expressed by *Brouldus v. Wilkinson*, 281 Ky. 601, 605; 136 S.W. (2d) 1052:

"We are unable to agree with the Michigan and Iowa courts upon the reason on which those opinions are based. It appears that those cases are based upon the doctrine of imputed negligence which is not here applicable. The question is one of immunity and whether or not the immunity of the husband is extended to the principal. The immunity of the husband is not based upon whether or not he was negligent but upon the ground of public policy of preserving of domestic peace and felicity. \* \* \* It appears that the weight of authority is to the effect that the marital immunity of a spouse does not mean that there is no right of action, but merely denies the remedy as against the spouse, and does not destroy the right of action against the master."

In *Chase v. New Haven, etc. Corp.*, 111 Conn. 377, 382; 150 Atl. 107 the court expressly refused to follow the earlier rule, stating

"Public policy may exempt the husband or parent from an action by the wife or child directly against him for his negligent act. There is no rule of law and no public policy which would exempt the employer."

*Pittsley v. David*, 298 Mass. 552, 553; 11 N.E. (2d) 461 states:

"The first defence is that a wife cannot recover from the master of her husband for injury caused to her by her husband's wrong. \* \* \* But though the defendant's contention finds support in decisions of a few states, we think it unsound. There is no universal legal identity of husband and wife. The policy that gives the husband immunity from action at law by the



wife (citing a Massachusetts case) does not extend to "the immunity to the master."

*McLaurin v. McLaurin Finance Co.*, 166 Miss. 180, 189; 190; 146 So. 877 quotes with approval the decision of Mr. Justice Cardozo cited above.

"In this state, we are committed to the common law doctrine that neither the wife nor the husband could maintain an action against the other for personal tort committed by one upon the other. \* \* \*

(p. 190) \* \* \* "In a case where the tortious act of the servant is the act of the master, the master is liable proximately even though the wife may not recover from the husband, the servant."

*Kauntz v. Messner*, 320 Pa. 487, 492; 181 Atl. 792;

"It must be conceded that some courts have held a wife barred against her husband's master in similar situations, (citing Iowa, Maine, Michigan, and Nebraska cases). We are convinced however that the better rule is that established in the contrary group of cases" (citing the New York case among others).

*Metropolitan Life Insurance Co. v. Huff*, 48 Ohio App. 412, 417; 194 N.E. 429 says:

"We prefer the reasoning of the cases hereinbefore cited in which it is held that a wife injured by the negligence of her husband while acting for his employer, and within the scope of his employment, may maintain an action against such employer, although she is precluded from maintaining an action against her husband for such injuries."

The following cases also support the above rule:

*Hensel v. Hensel etc. Co.*, 209 Wis. 489; 245 N.W. 159, *Meady Cleaners v. Daniels*, 235 Ala. 469; 179 So. 908, *Miller*

*v. Trigholm*, 196 Minn. 438; 265 N.W. 324, *Malalla v. Langenborg Bros. Grain Co.*, 339 Mo. 582; 98 S.W. (2d) 645.

Accordingly even though the negligent servant being a member of the armed forces could not be held liable to another member of the armed forces for his negligent act by reason of this immunity, such immunity does not relieve the soldier's master being the Government for damages resulting from such servant's negligence in the course of the servant's employment. Such is the law in the *Restatement*, and such is the rule recognized by the weight of authority. Accordingly in this case, even though an action would not lie against the hospital personnel, it would nevertheless lie against the master which is the United States.

The Federal Tort Claims Act states that the United States is liable under conditions where a private person would be liable for negligence of the employee. The Illinois courts have recognized the liability in the case of a private hospital in *Galesburg Sanitarium v. Jacobson*, 103 Ill. App. 26, 28 and *Olander v. Johnson*, 258 Ill. App. 89, 98. The Government makes no claim that such is not the law of Illinois, but extracts from those cases are cited in Appendix D. (p. 36).

THE MATTER OF THE REDUCTION OF THE PETITIONER'S CLAIM ON ACCOUNT OF ANY OTHER BENEFITS OR PAYMENTS IS NOT NOW BEFORE THIS COURT

The facts relative to the benefits and payments referred to on pages 37 and 38 of the Government's brief were not before the trial court which considered only the complaint (R. 2-4) and the motion to dismiss (R. 4 and 5), nor were such facts before the Court of Appeals until after the Court of Appeals had rendered its decision. These facts were first referred to in the Petition for Rehearing in the Court of Appeals (R. 25-27). The Petitioner here had no chance to submit such facts nor any answer thereto or comment thereon for the reason that under the rules of the Court of Appeals no answer or reply to the Petition for Rehearing

was permitted. Nevertheless, assuming the correctness of the facts as stated in the letters made a part of the Petition for Rehearing, the widow up to Jan. 11, 1950 would have received \$2,260.20, and would thereafter receive \$75.00 per month so long as she should remain unmarried, and she received \$2,695, the six months gratuity benefit.

The amount of the insurance should not be taken into consideration under the rule adopted by the Court of Appeals for the 4th Circuit on remand of *United States v. Brooks*, 176 F. (2d) 482, 485. It was there held that the insurance from the United States should not be considered in the computation of the judgment, any more than would insurance from any private life insurance company.

The Illinois statute Smith Hurd Ill. Ann. Stat. ch. 70, Sec. 2, provides that the recovery is for the exclusive benefit of

“widow and next of kin in the proportion provided by law in relation to distribution of personal property left by persons dying intestate.” (R. 3)

The letters attached to the Petition for Rehearing (R. 25-27) indicate the amount which only the widow is to receive. But Lt. Colonel Griggs left surviving him also a son (R. 4), who, under the intestate laws of Colorado, the residence of the deceased (R. 2), is entitled to one-half of the decedent's estate (Vol. 4 of 1935 Colo. Stat. Ann. ch. 176, sec. 1). The payments and benefits to the widow do not discharge the liability to the son who is one of the next of kin for whose benefit the Illinois statute provides a remedy.

Neither the District Court nor the Court of Appeals passed upon the amount of damages. Such issue is not before this Court, and the amount, if any, of any deduction for benefits or payments received by the widow are matters for determination in the first instance by the District Court if this Court shall affirm the judgment of the Court of Appeals.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the United States Court of Appeals for the 10th Circuit should be affirmed.

JAMES S. HENDERSON,  
209 Equitable Building,  
Denver, Colorado,  
*Counsel for Respondent.*

## APPENDIX A

### Federal Tort Claims Act

28 U.S.C. Sec. 941 (Now Sec. 2671)

As used in this title, the term—

(a) "Federal agency" includes the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: Provided, That this shall not be construed to include any contractor with the United States.

(b) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U.S.C. Sec. 931(a) (Now Secs. 1346(b) and 2674)

Subject to the provisions of this title, the United States District Court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States District Courts for the territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment,

under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

28 U.S.C. Sec. 943 (Now Sec. 2680)

The provisions of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C., Title 46, Secs. 741-752, inclusive), or the Act of March 3, 1925 (U.S.C., Title 46, Secs. 781-790 inclusive), relating to claims or suits in admiralty against the United States.



(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during the time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

## APPENDIX B

### Portion of Petitioner's Brief in Jefferson Case

Petitioner urges that his injury was not "incident to his service", in the ordinary connotation of the phrase, and hence maintains that he should be entitled to recover under the *Brooks* decision.

Petitioner's injury was not an injury incurred in the performance of petitioner's normal and usual military duties, incurred as it was while he was a patient in an Army hospital receiving treatment for cholecystitis (R. 17), an organic ailment wholly unconnected with his service in the armed forces. It might be contended that petitioner was required to undergo the hospital treatment for the purpose of maintaining his military fitness but, by analogy, the same argument might have been advanced in the *Brooks* case, *i.e.*, that the military personnel there were on furlough for the purpose of rest and rehabilitation designed to better suit them for military service. The risks and dangers ordinarily incident to military service do not include injuries resulting from the negligence of an Army surgeon in the treatment of an ailment unconnected with such service. Petitioner's injuries were incident to his service only "in the sense that all human events depend upon what has already transpired", as Mr. Justice Murphy expressed it in the opinion in the *Brooks* case. The word "incident" means apt to occur. *Smith v. New York Life Ins. Co.*, 86 N.E. 2d 340, 342. La. —. And it has been held that the negligence of a fellow servant is not an "incident of the employment" and the servant does not assume the risks thereof unless they are obvious and patent. *Smith v. Stuart C. Luba Co.*, 151 S. W. 2d 996, 997, 998, 202 Ark. 736. Surely petitioner's injury was not such as was apt or likely to occur in connection with his military service.

The phrase "incident to his service" has not been de-

finied by statute. The Judge Advocate General of the Army, however, has said that the phrase, as used in connection with property claims, refers to "damages, loss or destruction of property being used by the claimant in the actual performance of some official duty at the time the damage, loss or destruction occurs \* \* \*". See "Claims By and Against the Government", Judge Advocate General's School Text No. 8, p. 39 (1944).

It is true that petitioner was on "active duty" while hospitalized, but so were the Brooks brothers on "active duty" while on furlough. See *Moore v. United States*, 48 Ct. Cl. 110, 113. The decision of the Second Circuit in *Feres v. United States*, 177 F. 2d 535, 537, erroneously regards the servicemen in the *Brooks* case as not having been on "active duty". They were.

A soldier on furlough receives army pay and allowances (see The Judge Advocate General's School Text No. 3 "Military Affairs" p. VIII-25), is subject to the Articles of War and courts-martial (see Manual For Courts-Martial, U. S. Army—1949—par. 10, pp. 10-11), and is entitled to army hospitalization and medical care (see second Fourth Circuit decision in *Brooks* case, 176 F. 2d 482). If injured while on furlough and discharged from the Army, he is entitled to benefits under the Veterans Act only because he was disabled in line of duty while on *active* duty. Active duty status is one of the prerequisites of the Veterans Act of 1924, as amended, which provides for the payment of disability benefits (38 USCA 701 (a)) to:

"(a) Any person who served in the active military or naval service and who is disabled as a result of disease or injury or aggravation of a preexisting disease or injury incurred in line of duty in such service."

If fatally injured while on furlough, his legal repre-

sentative is entitled to the six months death gratuity (10 U.S.C.A. 903 and 456a). These benefits inure to the soldier on furlough, as was illustrated in the *Brooks* case, solely because he was on *active duty* and was injured "in line of duty." The theory is set out in *Moore v. U. S.*, 48 Ct. Cl. 110, 113, *supra*:

"As a general proposition, we believe a soldier is in line of duty until separated from the service by death or discharge, if during such time he is submitting to all of its laws and regulations. \* \* \* The provisions for furloughs or leaves of absence are a part of the disciplinary regulations of the military service, and no more separate a man from the service than an order to report to a different command."

For the historical development of the rule see The Judge Advocate General's School Text No. 3 "Military Affairs" (1943 ed.) pages X-26 to X-34.

It is submitted that the decision in the *Brooks* case should control here. If the injury and death of the servicemen there was compensable under the Tort Claims Act, then this petitioner should be entitled to recover, without regard to the question of whether injuries "incident to the service" are within the purview of the Act. Whether injured on furlough or in an army hospital, each is on active duty and subject to military control though not engaged in the performance of their *normal* duties, each is entitled to the same special statutory benefits and it is submitted that both should be entitled to the benefits of the Tort Claims Act.

## APPENDIX C

### Illinois Statutes and Decisions Relative to Survival of Actions

Smith Hurd Illinois Ann. Stat. Ch. 70 Section 1. Action for Damages.

Be it enacted by the People of the State of Illinois represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Section 2. Action By whom brought—Limit of Damages—Death outside State.

Every such action shall be brought by and in the names of the personal representatives of such deceased person and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person not exceeding the sum of \$15,000; Provided, that every such action shall be commenced within one year after the death of such person. Provided, further, that no action shall be brought or prosecuted in this State to recover dam-

ages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.

Since Lt. Colonel Griegs died in Missouri, it might seem that the last proviso barred the right to recover in Illinois but the Illinois Supreme Court in *Crane v. Chicago and W. L. R. R. Co.*, 233 Ill. 259, 263; 84 N.E. 222 considered a case where decedent was injured by the negligence of defendant railroad's lessee in Cook County, Illinois, but died in a hospital in Hammond, Indiana. The court said:

"We think it obvious that the object of the legislature in passing the proviso of Section 2, above referred to, was to prevent the bringing of actions in the courts of this state to recover damages for personal injuries resulting in death where the wrongful act causing it occurred outside of the limits of this State, and not to prevent the bringing of actions to recover damages for personal injuries, where the wrongful act, neglect, or default took place in this state, although the death occurred outside of this state."

The same rule was followed in *Portner v. Wabash R. Co.*, 162 Ill. App. 1, 3.

The Illinois court has also upheld the right of a foreign administratrix to sue for wrongful death in *Wabash, etc. R. Co. v. Shacklett*, 105 Ill. 364, 382 and such right has been held to extend to suits in the Federal Courts by *Waltz v. Chesapeake, etc. R. Co.*, 65 F. Supp. 913, 914.



## APPENDIX D

### Illinois Decisions on Liability of Hospitals

*Godshard Sanitarium v. Jackson*, 103 Ill. App. 26, 28.

"Appellee was ill and was a patient residing at the hospital for treatment, and was paying for the services he received, and was entitled to kind treatment, so far as the nature of his malady would allow. \* \* \* Appellant's servants on the occasion above referred to unnecessarily abused plaintiff, and inflicted upon him injuries for which the jury were warranted in holding their master responsible."

*Glander v. Johnson*, 258 Ill. App. 89, 98.

"A private hospital is one which is founded and maintained by a private person or corporation. Its liability for damages growing out of negligence is the same as that of natural persons."